(16)

No. 91-610-CFX
Status: GRANTED

Title: Local 144 Nursing Home Pension Fund, et al., Petitioners
v.
Nicholas Demisay, et al.

Docketed:
October 10, 1991

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Rose,Henry

Counsel for respondent: Richman,Ronald E.

Entry	Date	Note	Proceedings and Orders
1	Aug 20 1991		Application for extension of time to file petition and order granting same until October 10, 1991 (Marshall, August 21, 1991).
2	Oct 10 1991	D	Petition for writ of certiorari filed.
3	Nov 13 1991		DISTRIBUTED. November 27, 1991
4	Nov 13 1991		Brief of respondents Nicholas Demisay, et al. in opposition filed.
6	Nov 13 1991	G	Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as amicus curiae filed.
5	Nov 14 1991	G	Motion of Central States, et al. for leave to file a brief as amici curiae filed.
7	Nov 21 1991	X	Reply brief of petitioners Local 144 Nursing Home Pension Fund, et al. filed.
8	Dec 2 1991		REDISTRIBUTED. December 6, 1991
9	Dec 9 1991	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
11	Jun 2 1992	X	Brief amicus curiae of United States filed.
10	Jun 3 1992		REDISTRIBUTED. June 19, 1992
12	Jun 8 1992	X	Brief of respondents in opposition to the brief of the United States as amicus curiae filed.
13	Jun 22 1992		Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as amicus curiae GRANTED.
14	Jun 22 1992		Motion of Central States, et al. for leave to file a brief as amici curiae GRANTED.
15	Jun 22 1992		Petition GRANTED.
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17	Jul 15 1992		Order extending time to file brief of petitioner on the merits until August 26, 1992.
18	Aug 5 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Second Circuit.
19	Aug 5 1992		Record filed.
		*	Original proceedings United States District Court for the Southern District of New York (1 Box)
20	Aug 17 1992	G	Motion of petitioners to substitute Frank Russo, et al., etc. in place of Peter Ottley, deceased, and John Kelley, et al., etc. filed.
21	Aug 19 1992		REDISTRIBUTED. September 28, 1992
22	Aug 19 1992		Joint appendix filed.

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Entry	Date	Note	Proceedings and Orders
23	Aug 26 1992		Brief of petitioners Local 144 Nursing Home Pension Fund, et al. filed.
24	Aug 26 1992	G	Motion of Western Conference of Teamsters Pension Trust Fund for leave to file a brief as amicus curiae filed.
25	Aug 26 1992	G	Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as amicus curiae filed.
26	Aug 26 1992	G	Motion of Central States, Southeast and Southwest Health and Pension for leave to file a brief as amici curiae filed.
27	Aug 26 1992		Brief amicus curiae of United States filed.
29	Sep 8 1992		Order extending time to file brief of respondent on the merits until October 19, 1992.
30	Oct 5 1992		Motion of petitioners to substitute Frank Russo, et al., etc. in place of Peter Ottley, deceased, and John Kelley, et al., etc. GRANTED.
31	Oct 5 1992		Motion of Western Conference of Teamsters Pension Trust Fund for leave to file a brief as amicus curiae GRANTED.
32	Oct 5 1992		Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as amicus curiae GRANTED.
33	Oct 5 1992		Motion of Central States, Southeast and Southwest Health and Pension for leave to file a brief as amici curiae GRANTED.
35	Oct 17 1992		Brief of respondents Nicholas Demisay, et al. filed.
36	Nov 18 1992		Reply brief of petitioners filed.
37	Nov 20 1992		SET FOR ARGUMENT MONDAY, JANUARY 11, 1993.(1ST CASE.)
38	Nov 23 1992		CIRCULATED.
39	Jan 11 1993		ARGUED

91-610

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court of Appeals for the Second Circuit held that Section 302(c)(5) of the Labor Management Relations Act ("Section 302(c)(5)") required multiemployer pension and welfare plans to transfer assets, without transferring any liabilities, to new multiemployer plans where a few employers withdrew from the original multiemployer plans and established the new multiemployer plans with the same union.

The questions presented are:

1. Whether the court of appeals erred in applying Section 302(c)(5)—rather than the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended—as the governing law regarding such a transfer of assets from one multiemployer benefit plan to another, especially where the mandated transfer violates the governing instrument of the plan and violates one or more provisions of ERISA.

2. Whether either ERISA or Section 302(c)(5) requires a transfer of assets without a transfer of liabilities when an employer withdraws from a multiemployer pension or welfare benefit plan.

LIST OF PARTIES

All of the appellees in the proceedings below are petitioners before this Court. In addition to Local 144-Nursing Home Pension Fund, petitioners include New York City Nursing Home-Local 144 Welfare Fund, and Peter Ottley, John Kelley, Austin Cedeno, Frank McKinney, Bartholomew J. Lawson, Fred Wilkens, William McCarthy and Marsha McLendon, as Trustees of the Local 144-Nursing Home Pension Fund and New York City Nursing Home-Local 144 Welfare Fund.

All of the appellants in the proceedings below are respondents before this Court. In addition to Nicholas Demisay, respondents include Ernest Dicker, Jack Friedman and Abraham Grossman as Trustees of the Local 144-Southern New York Residential Health Care Facilities Association Pension Fund and Welfare Fund, Joseph Unger, as executor for the estate of Moses Unger, individually and d/b/a American Nursing Home, Abraham Grossman, individually and d/b/a Bruckner Nursing Home, Lyden Nursing Home and Williamsbridge Manor Nursing Home, B.N.H. Management Associates, Inc., Ernest Dicker, individually and d/b/a Clearview Nursing Home, Seacrest Nursing Home and Shoreview Nursing Home, Nicholas Demisay, individually and d/b/a Clove Lakes Nursing Home, Desdemona Jones Caruso, individually and d/b/a Fieldston Lodge Nursing Home, Jack Friedman, individually and d/b/a Fort Tryon Nursing Home, Franklin Nursing Home, and Friedwald House HRF, Wald Management Associates, Inc., 801 190th Street Management Associates, Inc., and 142-27 Franklin Avenue Management Associates, Inc. Respondents also include Edward Wizner, Martha Mulligan, Elizabeth Metcalf, Ivy Waite, Curlene McIntosh, Anelia Trout, Seena Moreno, Michael Heimur, Pamela Woods, Andrew Lenza, Mary Dibrienza, Euloeia Reyes, Marlene Louis, Mary Mozzolo, Fred Gerillo, Donna Jacobsen, Elsa Rivilla, Helen Leavy, Connie Caruselle, Yvonne Fernicola,

David Pabon, Cynthia Lee, Anita Harris and Mary Lindsay, as participants in the petitioner funds and respondent funds and as employees of the various respondent nursing homes.

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IN THE

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No. ———

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 935 F.2d 528, and is set forth in the Appendix to the Petition ("Pet. App.") at 1a. The opinion of the United States District Court for the Southern District of New York is reported at 710 F. Supp. 58, and is set forth at Pet. App. at 13a.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit was filed and entered on June 12, 1991. *See* Pet. App. at 1a. On August 21, 1991, Justice Marshall issued an order extending the time for filing this petition for certiorari to and including October 10, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and Section 302(c)(5) of the Labor-Management Relations Act of 1947 ("Section 302(c)(5)" or "LMRA"), 29 U.S.C. § 186(c)(5). Pertinent portions of these laws are set forth in the appendix hereto at 32a-53a.

STATEMENT OF THE CASE

A. Statement of the Facts

Petitioners New York City Nursing Home-Local 144 Welfare Fund ("Greater Welfare Fund") and Local 144-Nursing Home Pension Fund ("Greater Pension Fund") (collectively, the "Greater Funds") are multiemployer benefit funds. Until 1981, the respondent employers, who are members of the Southern New York Residential Health Care Facilities Association, Inc. ("Southern Employers"), belonged to the Greater New York Health Care Facilities Association, Inc. ("Greater New York Employer Association"), a multiemployer bargaining association. As members of the Greater New York Employer Association, the respondent employers were obligated pursuant to collective bargaining agreements between Greater New York Employer Association and Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees Union, SEIU, AFL-CIO ("Local 144") to contribute to the Greater Funds on behalf of their employees.

In 1981, the Southern Employers withdrew from the Greater New York Employer Association and negotiated individual contracts with Local 144 pursuant to which they continued contributing to the Greater Funds on behalf of their employees. On June 30, 1984, the Southern Employers withdrew from the Greater Funds and, after a strike, the Southern Employers and Local 144 signed a collective bargaining agreement providing for the estab-

lishment of the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Funds").

During the 1984 collective bargaining negotiations, Local 144 resisted the establishment of the Southern Funds and warned the respondent employers that they would have sole responsibility for assuring that employees received benefits under the new funds. Ultimately, Local 144 negotiated for and obtained contractual commitments from each respondent employer that their employees would lose nothing as a result of the establishment of the Southern Funds. The collective bargaining agreement between the Southern Employers and Local 144 did not provide for the transfer of any assets or liabilities from the Greater Funds to the Southern Funds, nor were the Greater Funds parties to that agreement.

Pursuant to a requirement in the collective bargaining agreement, the Southern Pension Fund trustees voted to grant credited service earned under the Greater Pension Fund by participants who had not yet vested.[1]

The benefit plans involved in this case provide benefits to employees in the nursing home industry, a low wage sector of our economy. Like other health benefit plans, the Greater Welfare Fund has been struggling to maintain health benefit levels in the face of ever rising costs. The Greater Pension Fund provides a modest maximum pension of $350 per month. This case does not raise issues regarding excess assets in benefit plans.

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[1] The employees of the Southern Employers did not accrue benefits in any pension plan between July 1, 1984, and November 30, 1985, because the Southern Pension Fund did not become operational until December 1, 1985. The Southern employers continued to contribute to the Greater Welfare Fund until September 30, 1985, and that Fund provided welfare benefits for the Southern employees until December 1, 1985, the operational date of the Southern Welfare Fund.

The Greater Funds have paid, and continue to pay, all benefits to which their participants are entitled, including benefits to which employees of the Southern Employers are entitled. In other words, the Greater Funds have retained all the liabilities they had to the employees of the Southern Employers who had been plan participants.

B. The Proceedings Below

The respondents initiated this action against petitioners in the United States District Court for the Southern District of New York in August 1985. The respondents contended that the Greater Funds' failure to transfer a portion of their plan assets to the Southern Funds constituted a "structural defect" in violation of Section 302(c)(5).[2] The respondents also contended that the trustees of the Greater Funds breached their fiduciary duties under ERISA, 29 U.S.C. § 1104(a), by not transferring a portion of the Greater Funds' assets to the Southern Funds. The respondents further contended that the Greater Funds violated ERISA, 29 U.S.C. § 1414, because the governing plan documents did not contain provisions requiring an asset transfer. Respondents and petitioners both filed motions for summary judgment on the above

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[2] Specifically, the respondents claimed that:

> [I]n order to comply with Section 302(c)(5) the Greater New York Pension Fund must recognize that its assets are attributable, in corresponding amounts, to the *contributions made by each contributing employer*. Further, *the Greater New York Pension Fund must utilize those assets solely to benefit the employees of each particular contributing employer*. . . . Otherwise, the Greater New York Pension Fund would be employing those assets for the sole and exclusive benefit of individuals other than the employees on whose behalf the contributions were made.

Response of respondents/plaintiffs to petitioners'/defendants' First Set of Interrogatories (emphasis added). Respondents made the same assertion regarding the Greater Welfare Fund (Joint Appendix at 388a-391a, 935 F.2d 528 (2d Cir.)).

claims. Petitioners also filed a motion to dismiss for lack of standing and jurisdiction.

On March 15, 1989, the District Court denied respondents' summary judgment motion, granted petitioners' motion for summary judgment on the first two claims, and dismissed the third claim for lack of standing. The District Court concluded that "any transfer here would be for the primary benefit of employers, not the employees" and that Congress did not intend to benefit employers. Pet. App. at 20a-21a. Further, the District Court, referring to ERISA, concluded that "[b]ecause Congress has specifically legislated in this area and has decided when a transfer of assets and liabilities is mandated, the Court should not and cannot expansively interpret LMRA Section 302(c)(5) so as to accomplish that result." Pet. App. at 26a. Finally, the District Court held that ERISA's asset transfer provisions were inapplicable because there had been no transfer of liabilities and the employees had not changed their bargaining representative. Pet. App. at 26a.

Respondents appealed that decision to the Court of Appeals for the Second Circuit. On June 12, 1991, the Second Circuit reversed the judgment of the District Court on the first claim, holding that unless plan assets attributable to employees whose employers withdrew from the Greater Funds and joined the Southern Funds were transferred to the Southern Funds, the Greater Funds would "suffer from a 'structural defect'" in violation of Section 302(c)(5). Pet. App. at 11a. The Second Circuit remanded with instructions to enter partial summary judgment for respondents and to determine the amounts of plan assets to be transferred to the Southern Funds. The Second Circuit found it unnecessary to reach the merits of the two remaining claims.

REASONS FOR GRANTING CERTIORARI

This case presents a fundamental question regarding the regulation of assets of employee benefit plans: whether ERISA or Section 302(c)(5) governs the transfer of plan assets from and between employee benefit plans. The decision of the Second Circuit also warrants review as it presents the important question of whether Congress intended Section 302—a criminal statute—to authorize the federal courts to regulate the transfer of assets of benefit plans. Underlying these important legal issues is their significant impact on the financial integrity of employee benefit plans covering millions of participants in multiemployer plans and the integrity of ERISA as the congressional articulation of national policy regarding employee benefit plans. In addition, there is a conflict of positions between the Second Circuit and other courts of appeal, as discussed below.

I. IN HOLDING THAT SECTION 302 OF THE LMRA GOVERNS THE TRANSFER OF ASSETS FROM EMPLOYEE BENEFIT PLANS, THE SECOND CIRCUIT DISREGARDED AND UNDERMINED THE CONGRESSIONAL SCHEME FOR THE REGULATION OF EMPLOYEE BENEFIT PLANS

In ERISA, Congress specifically considered the subject of plan asset transfers, provided detailed rules concerning it, and deliberately decided not to impose a transfer of assets requirement except in one circumstance[3] not relevant in the case at bar. ERISA, 29 U.S.C. §§ 1103, 1104, 1106, 1108, 1411-1415. Nevertheless, the Second Circuit based its decision entirely on an expansive interpretation of Section 302(c)(5)—a statute enacted decades earlier than ERISA and which does not even address

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[3] Congress mandated a transfer of assets and liabilities only when the employer withdrawal is the result of a certified change of bargaining representative. 29 U.S.C. § 1415. Since Title IV of ERISA applies only to pension plans, *see* 29 U.S.C. §§ 1301-1461, references to Title IV herein apply only to the Greater Pension Fund.

transfers of assets between plans—to hold that plan assets of the Greater Funds be transferred to the Southern Funds. The Second Circuit ordered this transfer notwithstanding the fact that Congress had enacted ERISA to be what this Court called the "comprehensive and reticulated statute" to regulate employee benefit plans. *Nachman Corp. v. PBGC*, 446 U.S. 359, 361 (1980).

Unless a contrary congressional intent is manifest, the congressional enactment of a comprehensive body of rules warrants the conclusion that those rules control where prior general statutory provisions may arguably touch on the subject matter. Particularly pertinent here is this Court's reasoning in *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979). In *Daniel*, the question was whether disclosure requirements under the law relating to securities were applicable to pension plans. This Court held that the "existence of this comprehensive legislation [ERISA] governing the use and terms of employee pension plans severely undercuts all arguments for extending" the federal securities law to pension plans. 439 U.S. at 569-70. This Court noted that:

> If any further evidence were needed to demonstrate that pension plans of the type involved are not subject to the Securities Acts, the enactment of ERISA in 1974, 88 Stat. 829, would put the matter to rest. Unlike the Securities Acts, ERISA deals expressly and in detail with pension plans. ERISA requires pension plans to disclose specified information to employees in a specified manner, see 29 U.S.C. §§ 1021-1030, in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts.

Id. at 569 (citations omitted).

The reasoning of this Court in *Daniel* applies with even greater force in the present case. The general lan-

guage of Section 302(c)(5) is in stark contrast to ERISA's comprehensive, detailed treatment of a specific question involved here, i.e., transfers of assets between multiemployer pension plans. Indeed, ERISA provides a detailed regulatory framework for dealing with the transfer of plan assets and the return of contributions to employers. 29 U.S.C. §§ 1103(c)(1) and (2), 1104(a)(1)(A) and (D), 1106(a)(1)(D), 1108(b)(11) and 1411-1415. The Second Circuit effectively ignored those provisions of ERISA, relying exclusively on Section 302(c)(5) to discern basic policies regulating employee benefit plans, even though ERISA is Congress' only comprehensive legislation in the field.

II. IN MANDATING A TRANSFER OF ASSETS WHERE THERE IS NO TRANSFER OF LIABILITIES, THE SECOND CIRCUIT HAS APPLIED A POLICY WITHOUT BASIS IN THE LANGUAGE OR LEGISLATIVE HISTORY OF THE LMRA

The Second Circuit's approach in this case is a classic example of the usurpation of the legislative process. The Second Circuit construed the "sole and exclusive" language in Section 302(c)(5) to require that an employer's contributions to a multiemployer benefit plan be used solely for the benefit of that particular employer's employees—at least in certain circumstances. In so doing, the Second Circuit applied Section 302(c)(5) to mandate that the Greater Funds transfer assets to the Southern Funds even though liabilities were not transferred.

Even if Section 302(c)(5) were applicable, a reasonable interpretation of its language would not require a transfer of assets in the case at bar. In the very statute relied upon by the Second Circuit, Congress said that employer contributions can be used not only for the "benefit of the employees of such employer," but also for "the employees of other employers making similar payments." Section 302(c)(5). The plain meaning of the

statute is that contributions of an employer may be applied to the benefit of employees of other contributing employers, as well as to the benefit of the employees of the particular contributing employer. Moreover, this Court has noted that there is not "any restriction on the allocation of the funds among the persons protected by § 302(c)(5)." *United Mine Workers of Am. Health & Retirement Funds v. Robinson*, 455 U.S. 562, 572 (1982). Further support is found in the Internal Revenue Code, which provides that, with respect to multiemployer plans, "in determining whether the plan of an employer is for the exclusive benefit of his employees and their beneficiaries, all plan participants shall be considered to be his employees." 26 U.S.C. § 413(b)(3). That is the fundamental principle on which multiemployer plans are based. Uncontroverted expert testimony in the record establishes that the Second Circuit's holding would undermine that fundamental principle and thereby undermine multiemployer benefit plans throughout the nation.[4]

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[4] Professor Dan M. McGill of the Wharton School of Finance, University of Pennsylvania, the foremost American academic scholar on employee benefit plans, stated that "diversion of multiemployer pension plan assets to . . . follow the employer and his employees when they leave the multiemployer plan . . . would be inconsistent with the basic concepts of multiemployer plans." McGill Affidavit (Joint Appendix at 270a-271a).

Mr. A. H. Higgs, Jr., Vice President of the Martin E. Segal Company, which firm serves about half of all multiemployer plan participants in the United States, pointed out that

> The contribution rate for a multiemployer plan is . . . determined on a uniform basis planwide . . . without regard to their employer or his employees' characteristics. . . . If the contributions of a particular employer in excess of the value of health benefits provided to the employer's employees were required to be paid out of the multiemployer plan to the benefit of that employer when the employer left the plan, only employers with a positive balance would likely choose to leave the plan and take

Indeed, there is not a scintilla of evidence in the statutory language or otherwise that Congress intended to require the transfer of assets mandated by the Second Circuit. The legislative history of Section 302 of the LMRA is completely barren of such evidence; the legislative history of ERISA clearly indicates that Congress intended to restrict transfers of assets from employee benefit plans generally and from multiemployer pension plans in particular.

This is not a case where Congress overlooked the eventuality of one plan claiming a transfer of assets from another plan. Congress considered transfers of assets in enacting ERISA, but decided to mandate a transfer in only a single circumstance, where the employer withdrawal is the result of a certified change of bargaining representative, 29 U.S.C. § 1415, and there was no change in the bargaining representative here. In ERISA, Congress specified, in detail, procedures and rules to govern such a transfer of assets and liabilities and made a transfer subject to review by a Federal agency, the Pension Benefit Guaranty Corporation. 29 U.S.C. § 1411. In particular, Congress required that any such asset transfer be accompanied by a transfer of liabilities.[5]

> assets from it. Employers with a negative balance would stay put, continuing to incur costs greater than their contributions. This is a classic case of the impermissible practice known to insurers as adverse selection.

Higgs Affidavit (Joint Appendix at 241a-242a, 244a-245a). If such adverse selection were forced upon it, a multiemployer plan would suffer the actuarial losses but would not have the benefit of the actuarial gains to offset the actuarial losses. Any employee benefit plan or insurance company in that situation cannot long survive.

[5] In fact, not only does the congressional scheme mandate that no plan assets be transferred without a corresponding transfer of liabilities, but also there are specified circumstances when "a transfer of assets from the old plan to the new plan is prohibited"—and even though an asset transfer is prohibited, "the old plan shall transfer" certain liabilities to the "new plan." 29 U.S.C. § 1415 (e)(1) and (2). Thus, although Congressional policy requires a transfer of assets only when accompanied with a transfer of lia-

Nevertheless, the Second Circuit applied Section 302(c)(5) to require the Greater Funds to transfer to the Southern Funds that portion of their plans' assets "which represents contributions on behalf of the Southern Employees for liabilities now undertaken by the Southern Funds." Pet. App. at 11a. Note the word "undertaken" used by the Second Circuit. The District Court concluded that "there has been no transfer of liabilities from the Greater Funds to the Southern Funds," Pet. App. at 24a, and the Second Circuit did not modify that finding as, indeed, it could not.[6] As the District Court correctly noted, "an assumption of liability for welfare benefits and past service credit by the Southern Funds is not the same as a transfer of liabilities from the Greater Funds to them, since the latter implies that the Greater Funds had a preexisting obligation to those who left the plan, which is simply not the case here." Pet. App. 24a.

The Second Circuit's construction of Section 302(c)(5) is a cancer that has the power to kill multiemployer benefit plans.[7] The Ninth Circuit, in rejecting the position that the Second Circuit has adopted here, expressly observed that:

> Because any multiemployer trust fund might result in one employer's payments covering the claims of another employer's employees, the Employers' argument leads inexorably to the conclusion that all multiemployer trust funds violate the "sole and exclusive benefit" rule of subsection 302(c)(5).

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bilities, in certain circumstances it requires the transfer of liabilities even in the absence of a transfer of assets.

[6] A transfer of liabilities requires the diminution of the liabilities of the transferor plan and the assumption of those liabilities by the transferee plan. 29 C.F.R. § 2670.3 (1987); 26 C.F.R. § 1.414(1)-1(b)(3) (1991).

[7] *See supra* n.4.

British Motor Car Distribs., Ltd. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371, 378 (9th Cir. 1989).[8]

The Second Circuit's decision is at cross-purposes with congressional policy because it operates to protect the interest of employers in derogation of the interests of the plans at issue. This Court has observed that Section 302(c)(5) of the LMRA was "meant to protect employees from the risk that funds contributed by their employers for the benefit of the employees and their families might be diverted to other union purposes or even to the private benefit of faithless union leaders" and that "Section 302(c)(5) is an exception in a criminal statute that broadly prohibits employers from making direct or indirect payments to unions or union officials." *United Mine Workers of Am. Health & Retirement Funds v. Robinson*, 455 U.S. 562, 571-72 (1982). *See also NLRB v. Amax Coal Co.*, 453 U.S. 322, 331 (1981); *Arroyo v. United States*, 359 U.S. 419, 425-26 (1959). In the present case, as the District Court noted, "there has been no allegation of corruption." Pet. App. at 23a.

Yet, the Second Circuit held that the failure of the Greater Funds to transfer assets so as to relieve the financial obligations of the Southern Employers does not comply with Section 302(c)(5). In the words of the District Court, "it is the [Southern] employers who have chosen to create a new fund" thereby causing "the obli-

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[8] The United Mine Workers Health and Retirement Funds is a dramatic example. As the Executive Summary to the November 1990 Report of the Secretary of Labor's Advisory Commission on the United Mine Workers of America Retiree Health Benefits stated, "more than half of the Funds' population is composed of orphan retirees" (i.e., participants whose former employers no longer contribute to the Fund). If an employer's contributions must be used only for the benefit of the contributing employer's employees, other participants in the plan would likely find themselves without benefits. In fact, congressional policy is precisely the opposite.

gation *they* assumed because *they* chose to create a new plan. It would indeed be anomalous to permit an employer to willingly assume obligations for its own purposes and then to use the financial pressures of that choice to force a transfer of assets from the plan from which it has chosen to withdraw." Pet. App. at 21a (emphasis in the original). Nevertheless, the Second Circuit delineated the amount of the required asset transfer by the "liabilities now undertaken by the Southern Funds" even though there has been no transfer of liabilities.[9]

Basic policy should be made by Congress through the legislative process, not by the courts. If the LMRA could be construed as mandating a transfer of money from one multiemployer plan to another, significant issues would be raised for every multiemployer plan in the nation regarding the scope and implementation of such a mandate.[10] For example, it would be necessary to decide whether a multiemployer plan should be required to transfer money if it had provided benefits to the withdrawing employers' employees in excess of the value of their employers' contributions,[11] or if the consequences of transferring plan assets would leave the transferor multiemployer plan in such financial distress that it would jeopardize the benefits of participants who remain in the transferor plan, or if any plan assets are to be trans-

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[9] *See* discussion regarding transfer of liabilities, *infra* pp. 10-11.

[10] The ramifications of the Second Circuit's decision may be felt by single employer plans, too, since the Second Circuit's view that employer contributions to a benefit plan must follow the employer and its employees apparently is not limited to multiemployer plans. *See Trapani v. Consolidated Edison Employees' Mutual Aid Society, Inc.*, 891 F.2d 48 (2d Cir. 1989).

[11] If the withdrawing employers' employees had received benefits exceeding their employers' contributions to the plan, would it not be equitable for the withdrawing employers to pay the plan the excess? However, Congress has enacted in ERISA a detailed set of rules requiring a totally different computation of withdrawal liability to be paid to a multiemployer pension plan by a withdrawing employer. 29 U.S.C. §§ 1381-1405.

ferred without the transfer of liabilities. These are all policy questions for the Congress.[12]

III. THE SECOND CIRCUIT'S MANDATE REQUIRING THE GREATER FUNDS TO TRANSFER ASSETS TO THE SOUTHERN FUNDS VIOLATES ERISA

By requiring the Greater Funds to transfer a significant portion of its assets to the newly-established Southern Funds, the Second Circuit is requiring conduct that violates ERISA. Whereas Title I of ERISA bars the use of plan assets to benefit employers,[13] the Second Circuit is mandating that plan assets be so used. Whereas Title I requires plan fiduciaries to administer the plan in accordance with the plan's governing documents,[14] the Second Circuit is requiring employee benefit plans to pay out money in violation of the plans' governing documents. Whereas Title IV of ERISA requires a withdrawing employer to pay a multiemployer pension plan withdrawal liability,[15] the Second Circuit is requiring that the plan from which the Southern employers withdrew pay money to the benefit of the withdrawing Southern employers.

The Second Circuit held that in its view the Greater Funds' failure to transfer assets to the Southern Funds violated Section 302—even though the conduct of the Greater Funds and their trustees are wholly consistent with their trust instruments and with the applicable rules in ERISA on asset transfers. Since Section 302 is a criminal statute, the Second Circuit is suggesting that, technically, the Greater Funds have committed a criminal act by complying with their governing trust instruments and with ERISA, both of which bar the plan asset transfers the Second Circuit says Section 302(c)(5) requires.

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[12] In the single circumstance where Congress has mandated such a transfer, the Congress has provided guidance on each of those policy questions. 29 U.S.C. § 1415.

[13] *See* discussion *infra* pp. 15-16.

[14] *See* discussion *infra* p. 16.

[15] *See* discussion *infra* p. 16.

With the passage of ERISA, Congress expressly prohibited the employer/plan sponsor from using the assets of the plan for its own benefit. ERISA limits the use of plan assets to "providing benefits" and "defraying reasonable expenses," which does not include transfers of assets for the benefit of employers or for participants in other plans. 29 U.S.C. § 1104(a)(1)(A). Further, ERISA mandates that "the assets of a plan shall never inure to the benefit of any employer." 29 U.S.C. § 1103(c)(1); *see also* 29 U.S.C. §§ 1106(a)(1)(D) and 1108(b)(11).

The District Court concluded that the transfer of assets sought by respondents would be for the benefit of the Southern employers. Pet. App. at 20a-21a. It is clear that any transfer of assets from the plans from which the plaintiff employers withdrew to the new plans will diminish the need for the respondent withdrawing employers to contribute to the new plans. Indeed, those employers admitted at deposition that that was their purpose in bringing this action. Moreover, the Internal Revenue Service ("IRS") has ruled that the transfer of assets from one multiemployer plan to another constitutes "income" to the contributing employers in the receiving plan. IRS Priv. Ltr. Rul. 89-48-302 (Sept. 6, 1989); *see also* IRS Priv. Ltr. Rul. 91-36-017 (June 10, 1991). That concept is underscored by the fact that it is the withdrawing employers themselves, and not the new Southern plans, that brought the present action.

ERISA provides specific rules regarding the return of contributions to employers. 29 U.S.C. § 1103(c)(2). However, there is no contention in the present case that there was an entitlement to the return of contributions pursuant to those provisions of ERISA, and indeed, there is no such entitlement. Insofar as the Second Circuit is effectively requiring a return of employer contributions, there is a clear conflict in the circuits. The Ninth Circuit has held that there is no right of action under Section 302(c)(5) of the LMRA for return of employer con-

tributions to an employee benefit plan; that court held that such a right of action is available only under Section 403(c)(2) of ERISA. *Award Serv. Inc. v. Northern California Retail Clerks Union & Food Employers Joint Pension Trust Fund*, 763 F.2d 1066 (9th Cir. 1985).

ERISA requires plan fiduciaries to administer the plan "in accordance with the documents and instruments governing the plan," 29 U.S.C. § 1104(a)(1)(D), and the trust instruments here clearly bar the transfers.[16] The Second Circuit ordered the transfers in clear contravention of those documents.

Furthermore, with the enactment of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208 (Sept. 26, 1980), Congress amended ERISA to provide greater protection for multiemployer plans. MPPAA includes a very narrow exception to the fundamental rule that assets of a plan cannot be applied to the benefit of the employer. ERISA provides that "a plan sponsor may not cause a multiemployer plan to . . . engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such . . . transfer satisfies the requirements of subsection (b)." 29 U.S.C. § 1411. There is no contention that these statutory prerequisites for such a transfer have been met in the present case.

ERISA provides that if an employer withdraws from a multiemployer pension plan, "then the employer is liable to the plan in the amount determined . . . to be the withdrawal liability." 29 U.S.C. § 1381. Thus, the

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[16] Virtually all multiemployer benefit plan trust instruments bar such transfers. In the courts below, respondents argued that multiemployer pension plans must have rules allowing transfer of assets and liabilities. However, that is so only if the transferor plan desires to make such a transfer. 29 U.S.C. § 1414. The Pension Benefit Guaranty Corporation and the only court of appeals to rule on the point support the view that it is a voluntary choice of the transferor plan. *Vornado, Inc. v. Trustees of the Retail Store Employees Union Local 1262*, 829 F.2d 416 (3d Cir. 1987).

statute seeks to protect such plans by providing that an employer that ceases participation in a plan faces the prospect of withdrawal liability—liability *to* the plan for the employer's share of the plan's unfunded liabilities, rather than as the Second Circuit required here, payments by the plan for the benefit of the employers who withdrew. Furthermore, insofar as the Second Circuit is holding that withdrawing employers are entitled to a proportionate share of the Greater Funds' assets, the position of the Second Circuit is in conflict with the Seventh Circuit's position "that Section 302(c)(5) 'does not require that an employee, employer, group of employers or union be given a proportionate share of a trust fund's assets simply because a decision is reached to cease participation in the trust.'" *Stinson v. Ironworkers Dist. Council of S. Ohio & Vicinity Benefit Trust*, 869 F.2d 1014, 1018 (7th Cir. 1989) (quoting with approval from the district court's opinion).

CONCLUSION

Fundamental to this case is the interplay between ERISA and Section 302(c)(5) of the LMRA regarding the regulation of employee benefit plans. The present case is an excellent vehicle for the clarification of the controlling law.

It is evident from the above, that the issues involved in the present case are not parochial ones. On the contrary, as indicated above, they are critical to the financial integrity of employee benefit plans covering millions of participants and involve the integrity of ERISA as the congressional articulation of national policy regarding employee benefit plans. These are matters of vital concern to a significant part of the private pension system in the United States.

For the foregoing reasons, petitioners respectfully request that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX
TO THE PETITION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1051 August Term 1990

Argued: March 4, 1991 Decided: June 12, 1991

Docket No. 90-7894

NICHOLAS DEMISAY, *et al.*,
Plaintiffs-Appellants,

-against-

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Defendants-Appellees.

BEFORE: KEARSE, PRATT, and McLAUGHLIN, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, John E. Sprizzo, *Judge*, granting summary judgment on two claims in favor of defendants and dismissing a third claim for lack of standing.

Reversed and remanded.

PRATT, *Circuit Judge*:

In *Local 50, Bakery and Confectionery Workers Union, AFL-CIO v. Local 3, Bakery and Confectionery Workers Union, AFL-CIO*, 733 F.2d 229 (2d Cir. 1984), we held that one union's health benefits trust fund was required to transfer certain monies to another union's health bene-

fits trust fund when all the employees of an employer had shifted their union allegiance from one union local to another. Today, we must revisit that problem in a slightly different context, where an employer leaves one set of multi-employer trust funds in favor of a different set of trust funds.

Specifically, the question before us is whether, when an employer leaves pension and welfare trust funds in favor of another set of trust funds, § 302(c)(5) of the Labor Management Relations Act ("LMRA") requires a reallocation of monies paid to the former funds on behalf of its employees, so that the monies are used "for the sole and exclusive benefit of the employees of such employer" as those terms are used in § 302(c)(5). Because we believe that absent some reallocation of monies, the former fund would suffer from a "structural defect", we reverse the judgment of the district court and remand with instructions to enter partial summary judgment in favor of the plaintiffs.

BACKGROUND

The appellants are management trustees, employers and management companies ("Southern Trustees", "Southern Employers" and "Southern Management Companies", respectively) which comprise the membership of the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Funds"), and employees ("Southern Employees") of the Southern Employers. Until 1981, the members of the Southern Funds were members of the Greater New York Health Care Facilities Association, Inc. ("Greater New York"), a multiemployer bargaining association, and were parties to collective bargaining agreements between Greater New York and Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees Union, SEIU, AFL-CIO ("Local 144"). Pursuant to those agreements, the Southern Employers were required to and did con-

tribute to pension and welfare funds established for the benefit of employees of the Greater New York employers ("Greater Funds", or separately, "Greater Pension Fund" and "Greater Welfare Fund").

The relationship between the Southern Employers and Greater New York ended in 1981, when the Southern Employers withdrew their membership in Greater New York. Upon their leaving Greater New York, the Southern Employers executed their own collective bargaining agreements with Local 144, agreements which obligated the Southern Employers to continue contributing to the Greater Funds on behalf of their employees.

This arrangement lasted until 1984, when the Southern Employers decided also to withdraw from the Greater Funds and, along with B.N.H. Management Associates, Inc., to establish their own pension and welfare funds. The Southern Employers then negotiated with Local 144 for a new collective bargaining agreement that allowed the new funds to be established. On November 30, 1984, the parties to that agreement provided for the establishment of the Southern Funds.

The agreement contained no provisions mandating a transfer of reserve funds from the Greater Funds to the Southern Funds. The agreement did provide, however, that (1) members of or contributors to the Southern Funds could sue to compel such a transfer, and (2) Local 144 would not oppose such a suit, provided that the suit was "consistent with applicable law."

The agreement clearly illustrates that Local 144's primary concern was to assure that none of its members would suffer a loss of benefits as a result of the Southern Employers' change from the Greater Funds to the Southern Funds. To this end, the agreement provided not only for a continuity of benefits for covered employees, but also contained a requirement that the Southern Funds would provide the same level of benefits as had the Greater Funds. The Southern Employers were required

to contribute to the Greater Welfare Fund until a date two months prior to the Southern Funds' operation. Additionally, the Greater Pension Fund ceased to accrue pension credits for the Southern Employees on July 1, 1984. The Southern Employers made pension contributions after July 1, 1984 to an escrow account maintained for the purpose of building reserves for the Southern Funds.

The Southern Funds were established on October 18, 1985, with the execution of trust agreements. The trustees of the new funds agreed that the Southern Funds would become operational on December 1, 1985. On November 5, 1985, the Southern Trustees agreed that the Southern Pension Fund would fully recognize all years of credited service earned by participants who had not yet vested under the Greater Pension Fund. Those employees who had vested under the Greater Pension Fund, since they would receive a partial pension from that fund, would be provided a supplemental portion of their ultimate benefit by the Southern Pension Fund, so that they would receive the same total benefit, but part would be paid by the Greater Pension Fund, where they were already vested, and the remainder or supplemental portion would be paid by the Southern Pension Fund.

To help finance this change from the Greater Funds to the Southern Funds, plaintiffs desired to have portions of the reserves in the Greater Funds that represented contributions on behalf of the Southern Employees transferred to the Southern Funds. To that end, plaintiffs filed this action in the district court, claiming (1) that the Greater Funds' trust documents, because they failed to provide for a transfer of a portion of their reserves to the Southern Funds, suffered from a "structural defect" which violated § 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5); (2) that the failure of the Greater Funds to provide asset transfer rules violated § 4234 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1414; and (3) that the defend-

ant Greater Fund trustees had breached their fiduciary duties under § 404 of ERISA, 29 U.S.C. § 1104.

In an opinion reported at 710 F. Supp. 58 (S.D.N.Y. 1989), the district court denied the plaintiffs' motion for partial summary judgment, granted the defendants' motion for summary judgment on the first and third claims, and dismissed the plaintiffs' second claim for lack of standing. On the first claim, involving § 302(c)(5), the district court distinguished our decision in *Local 50*, noting that the *Local 50* panel was influenced by policy concerns regarding collective bargaining. *Local 50* involved *employees* who had changed bargaining representatives (and, hence, health benefit funds), while here, it was the *employers* who had initiated the change of funds. Consequently, the district court held, "[t]he absence of those [collective bargaining] considerations requires a different result here." *Id.* at 63. The plaintiffs renew their arguments on appeal.

DISCUSSION

A. *ERISA or LMRA: Which Controls?*

As an initial matter, we must consider the appellees' contention that ERISA, not the LMRA, controls this appeal, since ERISA is a "comprehensive and reticulated" statute, *cf. Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361-62 (1980), and as a specific statute, must be given precedence over a more general one. Some background on this statutory scheme is necessary to understand how the statutes relate to each other.

In 1980 Congress passed the Multiemployer Pension Plan Amendments Act ("MPPAA"), which, *inter alia*, added § 4235 of ERISA, 29 U.S.C. § 1415, to require the transfer of assets and liabilities from one pension plan to another when a change in pension plans comes about "as a result of a certified change of collective bargaining representative." Since the MPPAA was silent on transfers resulting from other scenarios, the appellees argue that Congress must have meant for asset transfers to

occur *only* when the change is triggered by a certified change of collective bargaining representative; thus § 302(c)(5), in the appellees' view, cannot be read to make a structural defect out of a failure to transfer assets in situations not covered by § 4235 of ERISA.

We reject this argument. First, the proposition that a specific statute controls a general one applies only when the statutes are irreconcilable. When two statutes can live a peaceful coexistence, we must give effect to both of congress's commands. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Romano v. Luther*, 816 F.2d 832, 840 (2d Cir. 1987). It is well established that trust funds such as the ones at hand are governed *jointly* by the LMRA and ERISA; thus, both statutes not only can, but must, apply. *See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 561-62 (1985); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 366 n.1 (1984).

Second, to give § 302(c)(5) such a narrow reading, we would have to overrule our prior decision in *Local 50*, which held that section to be applicable and which found a structural defect where there had been a failure to transfer funds. The appellees suggest as much when they invite us to "modify" our previously-stated views. Appellees' Brief at 47. Since we decline the invitation, the appellees, in order to succeed, must show not only *Local 50*, but also our prior decisions in *Trapani v. Consolidated Edison Employees' Mutual Aid Soc'y, Inc.*, 891 F.2d 48 (2d Cir. 1989) and *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985), to be distinguishable. This they fail to do.

B. *Local 50*

In *Local 50*, we held that a union's health benefits fund was required to transfer, to a successor union's health benefits fund, that portion of the reserves attributable to those employees who "shifted their union

allegiance from one local to another." 733 F.2d at 230. Before reaching the merits of the case, however, we noted:

> On its face, this case deals with the rights of employees to reap the benefits of employer contributions made in lieu of wages. Viewed in this light, the problem here might be considered one of entitlement on the part of Entenmann's employees or, alternatively, unjust enrichment of those workers who retain Local 50 as their collective bargaining representative.
>
> Yet a more fundamental problem exists—one that strikes at the very core of collective representation. Specifically, were we to hold that Local 50 may retain the contributions made by Entenmann's on behalf of its employees, we would be imposing a great disincentive for employees ever to change bargaining representatives. Faced with the devil's alternative of either forfeiting their right to a substantial sum of employer contributions or retaining a collective bargaining representative with which they are less than satisfied, employees may well choose the latter. Such a result would not only impinge on free choice in representation, but would also permit unions without penalty to them to become less attentive to their constituencies' demands. * * * We see no necessity to make employees choose between two such bad bargains.

Id. at 233 (citation omitted).

The district court concluded that this language meant our decision in *Local 50* required a transfer of reserves only when it would (1) benefit employees and (2) absent a transfer, burden the employees' choice of bargaining representative. 710 F. Supp. at 63. While the appellees and the district court correctly recognized these concerns we had in *Local 50*, it does not follow that these concerns dictate a different result in this case. In *Trapani*, where

the change was initiated by an employer rather than by employees, we found "stronger equitable considerations in favor of plaintiffs than in *Local 50*" for the very reason that the employees had no say in the change of funds. *Trapani*, 891 F.2d at 50.

The district court also relied heavily on the fact that the new collective bargaining agreement with Local 144 contractually obligated the Southern Employers to provide the same level of benefits as the Greater Funds would have provided: "[T]hat circumstance is the consequence of the obligation *they* assumed because *they* chose to create a new plan." 710 F. Supp. at 63 (emphasis in original). According to the appellees, the Southern Employers backed their promise to Local 144 with their own assets, and thereby made a transfer of funds unnecessary for the protection of the employees.

This argument falls wide of the mark. We are being asked to interpret not a collective bargaining agreement, but a statute. Regardless of the terms of the agreement between the Southern Employers and Local 144, the fact that the Greater Funds hold pension and welfare contributions which will never result in benefits for the unvested employees is still a structural defect under § 302(c)(5). *See Local 50*, 733 F.2d at 235. As Senator Taft, one of the sponsors of the LMRA, remarked: "In other words, this must be a *trust* fund . . . it is in trust for the employees, who, after all have earned the money." 93 Cong. Rec. 4746 (1947), *reprinted in* 2 *Legislative History of the Labor Management Relations Act, 1947*, at 1311 (1948) (emphasis added). *See also id.* at 1498 (remarks of Sen. Ball), *quoted in Local 50*, 733 F.2d at 235.

C. *Section 302(c)(5) of the LMRA: "Sole and Exclusive Benefit"*

The district court did not fully appreciate that the "sole and exclusive benefit" provision of § 302(c)(5) recognizes that payments into a trust fund are in exchange for employees' labor, just as wages are, and should be protected

so that employees may enjoy the "sole and exclusive benefit" of their efforts. *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562, 570-72 (1982); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 328, 331 (1981); *Local 50*, 733 F.2d at 236. There is no requirement that an employer establish trust funds to benefit its employees; absent a contractual obligation, an employer could use these same funds to pay higher wages to its employees:

> If an employer agreed to give five cents to a union trust fund for every hour of work by an employe, the hourly wage paid directly to the employe would be five cents less. It is only just, said Congress, that the employe whose hour's work required the employer to make a payment of five cents to the trust fund be assured of reaping the benefit of that payment.

Bey v. Muldoon, 223 F. Supp. 489, 495 (E.D.Pa. 1963), *aff'd*, 354 F.2d 1005 (3d Cir.), *cert. denied*, 384 U.S. 987 (1966).

Section 302(c)(5)'s "sole and exclusive benefit" provision puts the force of law behind the principle that wages withheld by an employer should benefit the employees who earned those wages. Otherwise, the excess funding would operate as a windfall to the Greater Funds, a windfall which could be misused as the drafters of § 302(c)(5) feared. *See NLRB v. Amax Coal Co.*, 453 U.S. at 330 n.13; *International Brotherhood of Teamsters, Joint Council 18 v. New York State Teamsters Council Health & Hospital Fund*, 903 F.2d 919, 922 (2d Cir.), *cert. denied*, 111 S. Ct. 251 (1990).

Nevertheless, the appellees argue, the "sole and exclusive benefit" requirement is not violated here, because § 301(c)(5), which allows employers to pay money to their employees' representatives only "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other

employers making similar payments, and their families and dependents)", means that the monies may remain in the Greater Funds to benefit those employees whose employers did not change to the Southern Funds.

To support this argument, the appellees enlisted the aid of an expert at the district court, as well as two *amici curiae* in this court. All three have pointed out, correctly, that multi-employer plans are cost-sharing devices which pool funds. In theory, "any multiemployer trust fund might result in one employer's payments covering the claims of another employer's employees," *see British Motor Car Distributors v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371, 378 (9th Cir. 1989); therefore, so the argument goes, there is no right to reallocate monies which were placed in a multiemployer fund just because the monies had not yet been used for the payment of benefits.

This argument also misses the point of the "sole and exclusive benefit" requirement. Our holding today does not, as the appellees and *amici* fear, require multiemployer funds to tie the benefits of employer-participants to their individual contributions. It requires the reallocation of only those reserves that are attributable collectively to the labor of the employees whose employers have left the umbrella of the Greater Funds for that of the Southern Funds.

We have previously noted that, contrary to the fears of appellees and *amici*, the benefits of individual employees need not be tied to their individual contributions. In *O'Hare*, which we decided only three months after *Local 50*, we refused to find a § 302(c)(5) structural defect where *some*, but not all, of an employer's employees voluntarily changed unions, thus changing welfare and pension plans. We said:

> To claim that monies retained by the Funds contributed by an employer on behalf of all its employees [are] not contributed "for the sole and exclusive

> benefit of the employees of such employer" whenever some of the employees choose to leave the union and fund would be an unfair and unrealistic construction of section 302(c)(5). This is especially true when considering pension funds, where financing is based on long-range actuarial projections and vesting requirements which assume that some employees for whom contributions are made will never be eligible for benefits.

O'Hare, 740 F.2d at 173. However, when all the employees of an employer are removed from a fund, there is no chance, actuarial or otherwise, that any of the "employees of such employer" (with the obvious exception of the already-vested pensioners) will ever receive benefits based on their contributions. *Local 50*, 733 F.2d at 236. Thus, the only way that the Southern Employees could ever receive the "sole and exclusive benefit" of their employers' contributions to the Greater Funds on their behalf would be to mandate a reallocation of reserves from the Greater Funds to the Southern Funds. Absent such a reallocation, the Greater Funds would suffer from a "structural defect". *Local 50*, 733 F.2d at 235.

There remains to be determined what portion of the reserves of the Greater Funds are to be reallocated to the Southern Funds. In view of its original disposition of this case, the district court, of course, did not reach this question, so a remand for this purpose is necessary. As a general principle, the district court should require that the Greater Funds reallocate to the Southern Funds that portion of the reserves which represents contributions on behalf of the Southern Employees for liabilities now undertaken by the Southern Funds. *See Local 50*, 733 F.2d at 238.

Local 50 dealt only with a health benefits fund. We are faced here with a more complex situation involving both welfare and pension funds, as well as both vested and unvested interests in the pension fund. To determine the

amounts to be reallocated, further proceedings are necessary in the district court, which has broad discretion in the matter. It may be that the parties will be able to agree as to the proper amounts of reserves to be transferred. All of the funds should recognize that they exist solely for the benefit of the employees. Guided by whatever agreements and evidence the parties present, the district court shall exercise its discretion to shape an appropriate remedy guided by the principle that a fair portion of the reserves reflecting contributions made to the Greater Funds on behalf of the Southern Employees should be reallocated to the Southern Funds where the Southern Funds have undertaken the responsibility to pay the benefits for which the contributions were made.

CONCLUSION

Because we decide the case based on § 302(c)(5) of the LMRA, there is no need to consider the second and third claims raised by the appellants. The judgment of the district court is reversed, and the case is remanded with instructions to enter an appropriate partial summary judgment for the plaintiffs and for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 85 Civ. 6133 (JES)

NICHOLAS DEMISAY, *et al.*,
Plaintiffs,

v.

LOCAL 144, NURSING HOME PENSION FUND, *et al.*,
Defendants.

March 15, 1989

OPINION AND ORDER

SPRIZZO, District Judge:

Plaintiffs bring this action to compel the Local 144 Nursing Home Pension Fund and the New York City Nursing Home—Local 144 Welfare Fund [1] to transfer a share of their reserve funds to the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds.[2] Plaintiffs include the management trustees of the Southern Funds ("Southern management trustees"), the employers and management companies that are members of the Southern New York Residential Health Care Facilities Association, Inc. ("Southern employers" and "Southern management companies"),

[1] These funds will be referred to as the "Greater Pension Fund" and the "Greater Welfare Fund" or, collectively, the "Greater Funds."

[2] These funds will be referred to as the "Southern Pension Fund" and the "Southern Welfare Fund" or, collectively, the "Southern Funds."

and individual employees of the Southern employers and management companies ("Southern employees"). Defendants are the Greater Funds and the individual trustees of the Greater Funds. Plaintiffs have moved for partial summary judgment on the main claim. Defendants have moved to dismiss for lack of jurisdiction and standing and have cross-moved for summary judgment on the main claim.[3]

BACKGROUND

The following facts, except as noted, are undisputed.

Until 1981, the Southern Employers were members of the Greater New York Health Care Facilities Association, Inc. ("Greater New York"), a multiemployer bargaining association. *See* Affidavit of Jonathan L. Sulds ("Sulds Aff.") at ¶ 3. As a consequence of this membership, they were parties to collective bargaining agreements between Greater New York and Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees Union, SEIU, AFL-CIO ("Local 144"). *See id.* Under these agreements, Southern employers were obligated to contribute to the Greater Funds on behalf of their employees. *See id.*

The Southern employers withdrew from Greater New York in 1981. Thereafter, they negotiated and executed individual collective bargaining agreements with Local 144 pursuant to which they were obligated to continue contributing to the Greater Funds on behalf of their employees. *See id.* at ¶ 4.

In 1984, B.N.H. Management Associates, Inc. ("BNH") and the other Southern Employers sought to establish their own employee pension and welfare funds

[3] In addition, defendants moved for summary judgment on their counterclaims, and Local 144 Health Facilities Training and Upgrading Fund moved for intervention pursuant to Fed.R.Civ.P. 24(b)(2). By Order dated March 1, 1988, the Court denied those motions.

and entered into negotiations with Local 144 for new individual collective bargaining agreements which would accomplish that purpose. *See id.* at ¶ 5. Pursuant to collective bargaining agreements executed on November 30, 1984, the parties agreed to the establishment of the Southern Funds. *See id.* at ¶ 7.

The parties dispute what was said during the negotiations leading to these agreements as to whether a share of the Greater Fund reserves would be transferred to the Southern Funds. *See id.* at ¶ 6-9; Affidavit of Peter Ottley ("Ottley Aff.") at ¶ 2-8. However, the collective bargaining agreement does not contain any provision relating to such transfer, although the agreement did provide that members of or contributors to the Southern Funds could bring suit to compel a transfer and that Local 144 would "not oppose such litigation to the extent it is consistent with applicable law." *See, e.g.*, Sulds Aff., Ex. A at 26.

During these negotiations, Local 144 sought assurances that its members would receive the same level of benefits in the Southern Funds as provided by the Greater Funds. *See* Sulds Aff. at ¶ 8; Ottley Aff. at ¶ 9. Therefore, the agreements provided for a continuity of benefits for covered employees so that "[n]o employee shall lose benefits as a result of transfer of his/her coverage" from the Greater Funds to the Southern Funds. *See, e.g.*, Sulds Aff., Ex. A at 16. In addition, under the terms of the agreements, Local 144 agreed to employers making payments to the Southern Funds only on the condition that those Funds provide the same level of benefits as had been provided under the Greater Funds. *See id.*, Ex. A at 16-17.

The collective bargaining agreements further provided for contributions to the new funds. Each signatory employer was to contribute to the Greater Welfare Fund until the date two months prior to the operational date of the Southern Funds. *See* Sulds Aff. at ¶ 10; Ex. A at

20-21. In addition, pension contributions after July 1, 1984 were to be made to an escrow account. *See id.*, Ex. A at 20-21.

Trust agreements establishing the Southern Funds were executed on October 18, 1985, and the board of trustees agreed that the Southern Funds would become operational on December 1, 1985. *See id.* at ¶¶ 11-12 & Exs. B. C, D. Subsequently, the board of trustees of the Southern Pension Fund agreed that the Southern Fund would fully recognize all years of credited service earned under the Greater Pension Fund by any participants who had not vested under that plan.[4] *See id.* at ¶ 13 & Ex. E at 2. Furthermore, for employees vested under the Greater Pension Fund, the Southern Pension Fund would provide a pro rata portion of their ultimate pension benefit.[5] *See id.* at ¶ 14 & Ex. E at 2.

DISCUSSION

Plaintiffs in this action make three claims. First, they allege that the failure of the Greater Funds' trust documents to provide for the transfer of a portion of their reserves to the Southern Funds is a structural defect in the plans violative of section 302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5) (1982). Next, they allege that the Greater Funds violate section 4234 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1414 (1982), because they do not have asset transfer

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[4] For example, an employee with nine years credited service under the Greater Pension Fund who retired after participating in the Southern Pension Fund for one year would be vested under the Southern Pension Fund's ten year service requirement and would receive benefits based on ten years of service. *See* Sulds Aff. at ¶ 13 & Ex. E at 2.

[5] For example, an employee retiring with twenty five years of combined service, with eight years under the Southern Pension Fund, would receive eight/twenty-fifths of his total benefit from the Southern Pension Fund. *See* Sulds Aff. at ¶ 14 & Ex. E at 2.

rules. Finally, plaintiff employees allege that defendant trustees have breached their fiduciary obligations under section 404 of ERISA, 29 U.S.C. § 1104 (1982). The Court will address each of these claims in turn.

I. *LMRA section 302(c)(5)*

A. Jurisdiction

Plaintiffs in their first claim assert a violation of LMRA section 302(c)(5), 29 U.S.C. § 186(c)(5), which provides that employer payments may be made to an employee trust fund established for "the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents)." The federal courts clearly have jurisdiction under section 302(e), 29 U.S.C. § 186(e) (1982), to enforce a trust fund's compliance with this section. *See Local 50, Bakery & Confectionery Workers Union v. Local 3 Bakery & Confectionery Workers Union*, 733 F.2d 229, 234 (2d Cir.1984).

Defendants' argument that there is no jurisdiction here because the Court cannot examine the reasonableness of collectively bargained provisions, *see United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982), is untenable on the facts of this case. Plaintiffs do not challenge the reasonableness of any collectively bargained term, but rather allege that the Greater Funds do not comply with the specific standards of section 302(c)(5). *See Robinson*, 455 U.S. at 573 n. 12, 102 S.Ct. at 1233 n. 12; *see also infra* note 13. The Court clearly has jurisdiction to review a challenge that the Greater Funds are structurally deficient under that section's "sole and exclusive benefit" standard. *See Local 50, supra*, 733 F.2d at 234; *Alvares v. Erickson*, 514 F.2d 156, 165 (9th Cir.), *cert. denied*, 423 U.S. 874, 96 S.Ct. 143, 46 L.Ed.2d 106

(1975); *Teamsters Local No. 145 v. Kuba*, 631 F.Supp. 1063, 1068-69 (D.Conn.1986).

B. Standing

Defendants also challenge the standing of plaintiffs to assert their section 302(c)(5) claim. Defendants contend that because the purpose of section 302(c)(5) is to protect the interests of employees, only "employees in the fund" are proper parties to assert this claim. However, although section 302 does not specifically delineate who may sue or be sued, it has been held that employees, unions, trustees and employers all have standing to sue under section 302(c)(5). *See Molnar v. Wibbelt*, 789 F.2d 244, 248-49 (3d Cir.1986) (quoting *Copra v. Suro*, 236 F.2d 107, 114 (1st Cir. 1956)).

Moreover, standing under section 302(c)(5) does not require a nexus to the fund as close as that which may be required under ERISA.[6] *See Molnar, supra*, 789 F.2d at 249. Here, the Southern employers and management companies allege that unless there is a transfer of reserves to the new funds, the employers will be required either to reduce benefits or make more payments into the funds.[7] The Court concludes that this alleged injury is sufficient to establish standing. *Cf. Central Tool Co. v. Int'l Assoc. of Machinists Nat'l Pension Fund, Benefit Plan A*, 811 F.2d 651, 655-56 (D.C.Cir.1987).

The standing of Southern employees is less clear, because the employers have agreed that benefit levels will

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[6] Although standing was not raised as an issue in *Local 50*, the court there allowed a successor trust fund to maintain an action to compel compliance by a predecessor fund with Section 302(c)(5). *See Local 50, supra*, 733 F.2d at 234; *see also Alvares, supra*, 514 F.2d at 165.

[7] In fact, at Oral Argument, counsel for plaintiffs stated that because the Greater Funds have not transferred assets, there has already been a restructuring of the Southern Funds benefit plan and one form of benefit was dropped after collective bargaining. *See* Transcript at 17, 36.

remain the same.[8] However, assuming that the Southern employers are unable to properly fund the Southern Funds in the event that a transfer of reserves is not ordered, the possibility and perhaps the likelihood that their benefit levels might be adversely affected if the employers are financially unable to honor their commitment to the unions sufficient to confer standing to challenge the refusal of the Greater Funds to make that transfer. Moreover, as former employees in a welfare fund who seek to challenge a structural defect in that fund, they also have standing on that basis as well. *See Alvares, supra*, 514 F.2d at 164-65.

The management trustees of the Southern Funds have also sued, but the union trustees have not, and therefore the Southern Funds themselves are not parties to this action. The Southern Fund trust documents provide that trustee decisions shall be made by the concurring vote of a majority of union trustees, acting as one group, and management trustees, acting as one group, and that if trustees are unable to agree on an action, it shall be submitted to arbitration. *See* Sulds Aff. Ex. B at 24, 27 & Ex. C at 24, 27. The management trustees, therefore, cannot sue here without first employing the arbitration procedures in the trust documents. *See Alfarone v. Bernie Wolff Const. Corp.*, 788 F.2d 76, 79 (2d Cir.), *cert. denied*, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 289 (1986). Thus, any claim by the management trustees based upon their fiduciary duty to ensure that the Southern Funds contain all reserves to which they are entitled is premature.

C. The Merits

Plaintiff's argument here is that the Greater Welfare and Pension Funds are compelled to transfer a share of their reserves to the Southern Welfare and Pension

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[8] Defendants challenge the standing of Southern employees only as it relates to the Greater Welfare Fund.

Funds, not because of any agreement to do so, but because the law requires it. Relying on *Local 50*, the gist of their argument is that section 302(c)(5) makes it unlawful for funds contributed by one employer to be used for the benefit of persons other than its employees once the employer leaves the fund.

Although there is language in *Local 50* that would tend to support this position, that case presented a much different factual setting. In *Local 50*, where the Second Circuit found a structural defect in a union welfare plan, employees of Entenmanns had voted to change their bargaining representative from Local 50 to Local 3. As a result, Entenmanns' began contributing to the Local 3 welfare fund, and the Local 3 trustees assumed the duties then held by the Local 50 fund trustees. *See id.* at 231. It was in that context that Local 3 sought to have the portion of Local 50 welfare fund reserves representing Entenmanns past contributions transferred to the Local 3 fund. *See id.* at 232.

In reaching its conclusion that a transfer of reserves was required, the Court was influenced by the following equitable considerations. First, the case involved the rights of employees, not employers, to reap the benefits of employer contributions made in lieu of wages. *See id.* at 233. More importantly, however, that case involved a choice by employees to change their bargaining representative, a right "that strikes at the very core of collective representation." *Id.* The Court found that the absence of a provision for the transfer of an aliquot share of the reserves to the new fund could seriously interfere with the employees' right to choose their bargaining representative, a right protected by federal law, because absent such a transfer, an employee could only change unions at the cost of forfeiting payments previously made on his behalf by his employer. *See id.* at 234.

The absence of those considerations requires a different result here. First, any transfer here would be for the

primary benefit of the employers, not the employees.[9] It is undisputed that it was the employers who sought to create a new fund and that the employees, through their union, only agreed because the employers guaranteed to keep benefits at the same levels as under the former plans. Nowhere in section 302 or in ERISA, or the legislative history or case authorities construing either, is there any indication of a congressional intent to benefit employers. Thus, it would be in derogation of congressional intent to require a transfer when the effect of such transfer is to permit the *employers* to fund their promise to the union with assets from the old plan.

Moreover, this case does not present a situation where absent a transfer there would be a substantial interference with the free choice of a collective bargaining representative. *Cf. id.* at 233. Indeed, not only *Local 50*, but all of the other cases relied upon by plaintiffs involved either a change in collective bargaining representative or an *employee* decision to change plans. *See Local 50, supra*, 733 F.2d at 231; *Alvares, supra*, 514 F.2d at 159; *Trapani v. Consolidated Edison Employees*, 651 F.Supp. 400, 401-02 (S.D.N.Y. 1987). In this case it is the employers who have chosen to create a new fund, even though their employees have remained in the same union, Local 144.

Although the employers claim that if assets are not transferred they will be forced to pay more into the fund or they will have to reduce benefits, that circumstance is the consequence of the obligation *they* assumed because *they* chose to create a new plan. It would indeed be anomalous to permit an employer to willingly assume obligations for its own purposes and then to use the financial pressures of that choice to force a transfer of assets from the plan from which it has chosen to withdraw. This

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[9] Indeed, the only possible benefit to the employees would be to protect the employees against the circumstance that the employers might not be financially able to honor their commitment pursuant to the collective bargaining agreement.

Court therefore will not construe *Local 50* so as to compel that result.[10]

This is especially true since the union, which represented the employees, did not insist on a transfer of fund reserves as a condition to its agreement to permit the employers to set up the Southern Funds, but was satisfied with a commitment that benefit levels would not be reduced.[11] Thus, no rights of collective bargaining can be implicated where, as here, the union did collectively bargain and did not condition agreement to the Southern Funds on a transfer of assets.[12]

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[10] Defendants here also argue that a transfer of assets would violate the Greater Funds trust agreements as well as section 403(c)(1) of ERISA, 29 U.S.C. § 1103(c)(1) (1982), because no employer has any right to assets of the plan except to provide benefits to plan beneficiaries and Southern employees are no longer beneficiaries of the Greater Funds. The Court cannot accept that argument. In fact, *Local 50* involved a situation in which assets of a fund were transferred to a new fund to benefit persons who were no longer beneficiaries of the old fund. *See Local 50, supra,* 733 F.2d at 234.

The argument that a transfer of assets violates ERISA because it would benefit the employers has more persuasive force although the Court need not decide that issue because it concludes for other reasons that the assets need not be transferred. In any event, any transferred assets would be held in trust and arguably would not directly benefit the employers. *See Holliday v. Xerox Corp.,* 732 F.2d 548, 550-51 (6th Cir.), *cert. denied,* 469 U.S. 917, 105 S.Ct. 294, 83 L.Ed.2d 229 (1984).

[11] The union did agree that it would not object to the bringing of this action to the extent it would be consistent with applicable law, but that does not support an inference that the union agreed with the legal position of the Southern employers that a transfer of assets was mandated by law.

[12] It is also significant that the result plaintiffs seek here could place an employer who wishes to break away from a multiemployer plan in an enhanced bargaining position because it would be assured of being able to take its share of contributions from a predecessor fund. It would appear, therefore, that construing the statute so as to require a transfer could tend to subvert the collective bargaining position of the union, and that, if anything, the equitable consideration relied on in *Local 50* dictate the opposite result here.

Furthermore, section 302(c)(5) is an exception to a criminal statute designed primarily to address the problem of corruption in labor unions. *See Arroyo v. United States*, 359 U.S. 419, 425-26, 79 S.Ct. 864, 868-69, 3 L.Ed.2d 915 (1959). Although that provision clearly furthers "other beneficial policies such as an employee's freedom to choose the collective bargaining representative he wants," *see Local 50, supra*, 733 F.2d at 236, in this case the transfer which is sought does not further policies related to the choice of collective bargaining representative, and there has been no allegation of corruption. There is thus no reason to find a structural defect in the Greater Welfare and Pension Plans on the facts of this case.[13]

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[13] Defendants argue that the result sought by plaintiffs is foreclosed by *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 102 S.Ct. 1226, 71 L.Ed.2d 419 (1982), and that the *Local 50* Court misconstrued both *Robinson* and section 302(c)(5). The Court does not find these arguments persuasive.

In *Robinson*, the Court held only that a federal court could not test the reasonableness of a collectively bargained term under section 302(c)(5), so "long as such conditions do not violate federal law or policy." *See id.* at 574-75, 102 S.Ct. at 1233-34. Here, although the Greater Fund trust documents provide that no one may have rights to the funds except as specified in the plans and the plans have no provision regarding the transfer of assets, plaintiffs do not challenge the reasonableness of any provision, but instead argue the plans are violative of section 302(c)(5). *Robinson*, therefore, does not apply. *See Local 50, supra*, 733 F.2d at 236; *see also Chambless v. Masters, Mates & Pilots Pension Plan*, 772 F.2d 1032, 1040 (2d Cir.1985). In addition, defendants argue that in *Local 50* the Court incorrectly found that in *Robinson*, "the money retained by the trust fund redounded to the 'sole and exclusive benefit' of each contributing employer's employees." *See Local 50, supra*, 733 F.2d at 236. Defendants contend that the funds at issue in *Robinson* were pooled multiemployer funds which did not segregate out contributing employers' funds. However, in *Robinson* the money did inure to the "sole and exclusive benefit" of all contributing employers' employees because no one had left the fund. Moreover, the issue in *Robinson* was not whether the plan was unlawful for that reason but rather whether it was reasonable to distribute fund benefits among fund participants in the manner provided for in the plan. *See Robinson, supra*, 455 U.S. at 568, 102 S.Ct. at 1230.

The Court also rejects plaintiffs' argument that the Southern Funds, which are not parties here, have assumed the liabilities of the Greater Funds and that therefore the assets attributable to those liabilities must follow those liabilities. The Greater Funds never had any liability to accrue pension credit or provide welfare coverage for persons who had left the fund, and the Greater Pension Fund continues to provide pension benefits to those employees who have vested under the Greater Pension Plan.[14] While it is true that the Greater Welfare Plan no longer provides welfare coverage and the Greater Pension Plan no longer accrues service credits for the Southern employees, plaintiffs have not claimed and cannot claim that either of the Greater Funds ever had any obligation to provide benefits or accrue credit for persons who were no longer in the plan.

It is true that the Southern Pension Fund does recognize past years of service for those employees who had not vested under the Greater Pension Fund, but that was a decision made by the Southern Fund trustees after establishment of those funds. Moreover, an assumption of liability for welfare benefits and past service credit by the Southern Funds is not the same as a transfer of liabilities from the Greater Funds to them, since the latter implies that the Greater Funds had a preexisting obligation to those who left the plan, which is simply not the case here. The Court concludes therefore that there has been no transfer of liabilities from the Greater Funds to the Southern Funds.[15]

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[14] In fact, plaintiffs state that this is a liability that they will assume once the assets of the Greater Funds are transferred to them. *See* Plaintiff's Reply Memorandum of Law at 20 n. *.

[15] In addition, under the definition of a transfer of liabilities under ERISA, there has not been a "diminution of . . . liabilities with respect to [the Greater Funds] and . . . the assumption of these liabilities by [the Southern Funds] . . ." *See* 29 C.F.R. § 2670.3 (1987).

It is also significant to note that plaintiffs' claim for a transfer of assets from the Greater Pension Fund is clearly foreclosed by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1381 *et seq.* (1982). In these amendments, after a careful examination of issues relating to the funding of pension plans, Congress enacted a comprehensive statute regulating employer withdrawal from pension plans.[16] However, only one provision of these amendments, section 4235 of ERISA, mandates the transfer of assets and liabilities, and that is when "an employer has completely or partially withdrawn from a multiemployer plan . . . as a result of a certified change of collective bargaining representative." *See* 29 U.S.C. § 1415 (Supp. IV 1986). Although there are several provisions dealing with the merger or transfer of plan assets or liabilities under MPPAA, in no other situation is a transfer of assets and liabilities mandated. *See* 29 U.S.C. §§ 1411-15.

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[16] The Court does not accept the argument that MPPAA applies to all multiemployer plans, not just pension plans. In *Trustees v. Lith-O-Kraft Plate Co.*, 692 F.Supp. 782 (N.D.Ohio 1988), the Court held that Congress did not intend to impose withdrawal liability under MPPAA on employers withdrawing from a welfare fund. *See id.* at 787-88. The Court finds the reasoning of that case persuasive. Although the language of the statute does refer to "multiemployer plans", the Court has been unable to find, nor has plaintiff cited, a case applying the MPPAA amendments to any plans other than pensions plans.

Similarly, in *T.I.M.E.—D.C., Inc. v. Management-Labor Welfare & Pension Funds, of Local 1730*, 756 F.2d 939 (2d Cir.1985), the Court stated that "[t]he goal of the withdrawal and transfer provisions of the MPPAA is to ensure that the employer covers its pension obligations in both the old and the new plans." *See id.* at 945-46; *see also New York State Teamsters Conference Pension & Retirement Fund v. McNicholas Transp. Co.*, 848 F.2d 20, 22 (2d Cir.1988). Moreover, the title of the Act and the legislative history of the amendments indicate that Congress sought to regulate multiemployer *pension* plans, not all multiemployer plans. *See* H.R. Rep. No. 869, 96th Cong., 2d Sess., pt. 1 at 51, *reprinted in* 1980 U.S. Code Cong. & Admin. News 2918, 2919.

Congress, therefore, has specifically determined that the only situation in which a pension plan must transfer assets and liabilities is when there has been a certified change in collective bargaining representative.[17] Because Congress has specifically legislated in this area and has decided when a transfer of assets and liabilities is mandated, the Court should not and cannot expansively interpret LMRA section 302(c)(5) so as to accomplish that result. *Cf. Teamsters v. Daniels*, 439 U.S. 551, 569-70, 99 S.Ct. 790, 801-02, 58 L.Ed.2d 808 (1979). Indeed, as the Court of Appeals has noted, most of the problems created by employer withdrawal from multiemployer pension plans have been resolved by MPPAA. *See O'Hare v. General Marine Transp. Corp.*, 740 F.2d 160, 173 n. 8 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212, 105 S.Ct. 1181, 84 L.Ed.2d 329 (1985).

Therefore, for the reasons stated above, the Court concludes that the Greater Welfare Funds and the Greater Pension Funds are not structurally deficient under section 302(c)(5) and that plaintiffs' first claim must be dismissed.

II. *ERISA*

A. Asset Transfer Rules

Plaintiffs also claim that the Greater Funds are deficient for failing to adopt asset transfer rules pursuant to section 4234 of ERISA, 29 U.S.C. § 1414, and seek an order requiring the Greater Funds to adopt asset transfer rules.[18] It is undisputed here that the Greater Pension

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[17] This congressional choice affords further support for the Court's view that *Local 50* should not be read as requiring a transfer for any purpose other than protecting the freedom of employees in selecting their collective bargaining representative.

[18] 29 U.S.C. § 1414(a) provides in pertinent part:

A transfer of assets from a multiemployer plan to another plan shall comply with asset-transfer rules which shall be adopted by the multiemployer plan and which

Fund does not have asset transfer rules.[19] *See* Plaintiffs' First Request for Admission of Facts at ¶¶ 6-7. However, even assuming arguendo that the Greater Pension Fund is deficient in failing to have asset transfer rules, under MPPAA plaintiffs must be "adversely affected" by that omission. *See* Section 4301(a)(1) of ERISA, 29 U.S.C. § 1451(a)(1) (1982). Plaintiffs cannot meet that burden unless they can establish that a transfer pursuant to those asset transfer rules would inure to their benefit.[20] This they have failed to do. It follows that they lack standing to assert that claim.

Moreover, section 1414 does not address any situation except that in which a plan is transferring assets "in connection with the transfer of plan liabilities." Therefore, this section would be relevant to this case only if there had been a transfer of liabilities. Because the Court has concluded that there has been no transfer of liabilities from the Greater Funds to the Southern Funds, this section is inapplicable.

In addition, section 1414 applies only to a situation in which there is a transfer of assets in connection with a voluntary transfer of liabilities, not a transfer by operation of law. *See Vornado, Inc. v. Trustees of the Retail Store Employees' Union Local 1262*, 829 F.2d 416, 420-21 (3d Cir. 1987). As stated *supra*, Congress clearly pro-

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(1) do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities, and

(2) operate and are applied, uniformly with respect to each proposed transfer, except that the rules may provide for reasonable variations taking into account the potential financial impact of a proposed transfer on the multiemployer plan.

[19] As stated *supra* at note 16, the Court does not accept the argument that the MPPAA amendments were intended to apply to all multiemployer plans rather than only pension plans.

[20] Plaintiffs have not argued that section 1414 itself would require the transfer. Instead, they argue that *Local 50* requires the transfer and that rules adopted pursuant to section 1414 would effectuate the transfer. *See* Plaintiffs' Reply Memorandum of Law at 25.

vided in 29 U.S.C. § 1415 for a situation in which a transfer of assets and liabilities would be mandated and there is no indication in the statute or its legislative history demonstrating that Congress intended to require a transfer of assets in any other situation unless there was a voluntary transfer of liabilities, which is clearly not the case here. *See* Views and Analysis of Senate Labor Committee on S. 1076, Benefits and Pension Reporter No. 288 (Apr. 28, 1980).

Moreover, MPPAA emphasized the interests of plan beneficiaries and the Pension Benefit Guaranty Corporation and was not designed to increase the power of contributing employers. *See Vornado, supra,* 829 F.2d at 420. Here, the result sought by plaintiffs would increase the power of contributing employers by forcing a transfer of assets to a new fund they wished to create.

B. Breach of Fiduciary Duty

Plaintiff employees also allege that defendants have violated their fiduciary duty under section 404 of ERISA, 29 U.S.C. § 1104, for failing to administer the trust documents in accordance with ERISA by failing to adopt asset transfer rules and for treating the Southern employees differently from those employees still in the Greater Funds by failing to transfer an aliquot share of assets. The Court has already determined that the Greater Funds are not structurally deficient under section 302(c)(5) and that any failure of the Greater Pension Fund to have asset transfer rules would not aggrieve these plaintiffs. It follows that the trustees have not violated any fiduciary duty owed to plaintiffs in refusing to transfer assets pursuant to section 302(c)(5). Therefore, plaintiffs' claim for a breach of fiduciary duty must be dismissed.

CONCLUSION

For the reasons set forth above, plaintiffs' motion for partial summary judgment on the main claim is denied; defendants' motion for summary judgment on the section 302 claim is granted; defendants' motion to dismiss the section 1414 claim for lack of standing is granted; and defendants' motion for summary judgment on the section 404 claim is granted.

It is SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of June, one thousand nine hundred and ninety-one.

Present: HON. AMALYA L, KEARSE
HON. GEORGE C. PRATT
HON. JOSEPH M. MCLAUGHLIN
Circuit Judges,

90-7894

NICHOLAS DEMISAY, *et al.*,
Plaintiffs-Appellants,

-v-

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of New York

MANDATE

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the appeal from a judgment of said district court is reversed and the action be and it hereby is remanded to the district court for further proceedings consistent with the opinion of this court.

Elaine B. Goldsmith
Clerk

By: /s/ Edward J. Guardaro
EDWARD J. GUARDARO
Deputy Clerk

Issued as Mandate July 3, 1991

EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, AS AMENDED, 29 U.S.C. §§ 1001-1461

Section 403(c)(1)-(2), 29 U.S.C. § 1103(c)(1)-(2)

Establishment of trust

* * * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), or under section 420 of Title 26 as in effect on January 1, 1991) the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2)(A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

(i) if such contribution or payment is made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) if such contribution or payment is made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribu-

tion or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

* * * *

Section 404(a)(1), 29 U.S.C. § 1104(a)(1)

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

Section 406(a)(1), 29 U.S.C. § 1106(a)(1)

Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

Section 408(b)(11), 29 U.S.C. § 1108(b)(11)

Exemptions from prohibited transactions

* * * *

(b) Enumeration of transactions exempted from section 1106 prohibitions

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

* * * *

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

Section 4201(a), 29 U.S.C. § 1381(a)

Withdrawal liability established; criteria and definitions

(a) If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

Section 4231, 29 U.S.C. § 1411

Mergers and transfers between multiemployer plans

(a) Authority of plan sponsor

Unless otherwise provided in regulations prescribed by the corporation, a plan sponsor may not cause a multiemployer plan to merge with one or more multiemployer plans, or engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such merger or transfer satisfies the requirements of subsection (b) of this section.

(b) Criteria

A merger or transfer satisfies the requirements of this section if—

(1) in accordance with regulations of the corporation, the plan sponsor of a multiemployer plan notifies the corporation of a merger with or transfer of plan assets or liabilities to another multiemployer plan at least 120 days before the effective date of the merger or transfer;

(2) no participant's or beneficiary's accrued benefit will be lower immediately after the ef-

fective date of the merger or transfer than the benefit immediately before that date;

(3) the benefits of participants and beneficiaries are not reasonably expected to be subject to suspension under section 1426 of this title; and

(4) an actuarial valuation of the assets and liabilities of each of the affected plans has been performed during the plan year preceding the effective date of the merger or transfer, based upon the most recent data available as of the day before the start of that plan year, or other valuation of such assets and liabilities performed under such standards and procedures as the corporation may prescribe by regulation.

(c) Actions not deemed violation of section 1106(a) or (b)(2) of this title

The merger of multiemployer plans or the transfer of assets or liabilities between multiemployer plans, shall be deemed not to constitute a violation of the provisions of section 1106(a) of this title or section 1106(b)(2) of this title if the corporation determines that the merger or transfer otherwise satisfies the requirements of this section.

(d) Nature of plan to which liabilities are transferred

A plan to which liabilities are transferred under this section is a successor plan for purposes of section 1322a(b)(2)(B) of this title.

Section 4232, 29 U.S.C. § 1412

Transfers between multiemployer plan and single-employer plan

(a) General authority

A transfer of assets or liabilities between, or a merger of, a multiemployer plan and a single-employer plan shall satisfy the requirements of this section.

(b) Accrued benefit of participant or beneficiary not lower immediately after effective date of transfer or merger

No accrued benefit of a participant or beneficiary may be lower immediately after the effective date of a transfer or merger described in subsection (a) of this section than the benefit immediately before that date.

(c) Liability of multiemployer plan to corporation where single-employer plan terminates within 60 months after effective date of transfer; amount of liability, exemption, etc.

(1) Except as provided in paragraphs (2) and (3), a multiemployer plan which transfers liabilities to a single-employer plan shall be liable to the corporation if the single-employer plan terminates within 60 months after the effective date of the transfer. The amount of liability shall be the lesser of—

(A) the amount of the plan asset insufficiency of the terminated single-employer plan, less 30 percent of the net worth of the employer who maintained the single-employer plan, determined in accordance with section 1362 or 1364 of this title, or

(B) the value, on the effective date of the transfer, of the unfunded benefits transferred to the single-employer plan which are guaranteed under section 1322 of this title.

(2) A multiemployer plan shall be liable to the corporation as provided in paragraph (1) unless, within 180 days after the corporation receives an application (together with such information as the corporation may reasonably require for purposes of such application) from the multiemployer plan sponsor for a determination under this paragraph—

(A) the corporation determines that the interests of the plan participants and beneficiaries and of the corporation are adequately protected, or

(B) fails to make any determination regarding the adequacy with which such interests are protected with respect to such transfer of liabilities.

If, after the receipt of such application, the corporation requests from the plan sponsor additional information necessary for the determination, the running of the 180-day period shall be suspended from the date of such request until the receipt by the corporation of the additional information requested. The corporation may by regulation prescribe procedures and standards for the issuance of determinations under this paragraph. This paragraph shall not apply to any application submitted less than 180 days after September 26, 1980.

(3) A multiemployer plan shall not be liable to the corporation as provided in paragraph (1) in the case of a transfer from the multiemployer plan to a single-employer plan of liabilities which accrued under a single-employer plan which merged with the multiemployer plan, if, the value of liabilities transferred to the single-employer plan does not exceed the value of the liabilities for benefits which accrued before the merger, and the value of the assets transferred to the single-employer plan is substantially equal to the

value of the assets which would have been in the single-employer plan if the employer had maintained and funded it as a separate plan under which no benefits accrued after the date of the merger.

(4) The corporation may make equitable arrangements with multiemployer plans which are liable under this subsection for satisfaction of their liability.

(d) Guarantee of benefits under single-employer plan

Benefits under a single-employer plan to which liabilities are transferred in accordance with this section are guaranteed under section 1322 of this title to the extent provided in that section as of the effective date of the transfer and the plan is a successor plan.

(e) Transfer of liabilities by multiemployer plan to single-employer plan

(1) Except as provided in paragraph (2), a multiemployer plan may not transfer liabilities to a single-employer plan unless the plan sponsor of the plan to which the liabilities would be transferred agrees to the transfer.

(2) In the case of a transfer described in subsection (c)(3) of this section, paragraph (1) of this subsection is satisfied by the advance agreement to the transfer by the employer who will be obligated to contribute to the single-employer plan.

(f) Additional requirements by corporation for protection of interest of plan participants, beneficiaries and corporation; approval by corporation of transfer of assets or liabilities to single-employer plan from plan in reorganization; covered transfers in connection with termination

(1) The corporation may prescribe by regulation such additional requirements with respect to the transfer of assets or liabilities as may be necessary to protect the interests of plan participants and beneficiaries and the corporation.

(2) Except as otherwise determined by the corporation, a transfer of assets or liabilities to a single-employer plan from a plan in reorganization under section 1421 of this title is not effective unless the corporation approves such transfer.

(3) No transfer to which this section applies, in connection with a termination described in section 1341a(a)(2) of this title shall be effective unless the transfer meets such requirements as may be established by the corporation to prevent an increase in the risk of loss to the corporation.

Section 4233, 29 U.S.C. § 1413

Partition

(a) Authority of corporation

The corporation may order the partition of a multiemployer plan in accordance with this section.

(b) Authority of plan sponsor upon application to corporation for partition order; procedures applicable to corporation

A plan sponsor may apply to the corporation for an order partitioning a plan. The corporation may not order the partition of a plan except upon notice to the plan sponsor and the participants and beneficiaries whose vested benefits will be affected by the partition of the plan, and upon finding that—

(1) a substantial reduction in the amount of aggregate contributions under the plan has re-

sulted or will result from a case or proceeding under Title 11 with respect to an employer;

(2) the plan is likely to become insolvent;

(3) contributions will have to be increased significantly in reorganization to meet the minimum contribution requirement and prevent insolvency; and

(4) partition would significantly reduce the likelihood that the plan will become insolvent.

(c) Authority of corporation withstanding pendency of partition proceeding

The corporation may order the partition of a plan notwithstanding the pendency of a proceeding described in subsection (b)(1) of this section.

(d) Scope of partition order

The corporation's partition order shall provide for a transfer of no more than the nonforfeitable benefits directly attributable to service with the employer referred to in subsection (b)(1) of this section and an equitable share of assets.

(e) Nature of plan created by partition

The plan created by the partition is—

(1) a successor plan to which section 1322a of this title applies, and

(2) a terminated multiemployer plan to which section 1341a(d) of this title applies, with respect to which only the employer described in subsection (b)(1) of this section has withdrawal liability, and to which section 1368 of this title applies.

(f) Authority of corporation to obtain decree partitioning plan and appointing trustee for terminated portion of partitioned plan

The corporation may proceed under section 1342 (c) through (h) of this title for a decree partitioning a plan and appointing a trustee for the terminated portion of a partitioned plan. The court may order the partition of a plan upon making the findings described in subsection (b) (1) through (4) of this section, and subject to the conditions set forth in subsections (c) through (e) of this section.

Section 4234, 29 U.S.C. § 1414

Asset transfer rules

(a) Applicability and scope

A transfer of assets from a multiemployer plan to another plan shall comply with asset-transfer rules which shall be adopted by the multiemployer plan and which—

(1) do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities, and

(2) operate and are applied uniformly with respect to each proposed transfer, except that the rules may provide for reasonable variations taking into account the potential financial impact of a proposed transfer on the multiemployer plan.

Plan rules authorizing asset transfers consistent with the requirements of section 1412(c)(3) of this title shall be considered to satisfy the requirements of this subsection.

(b) Exemption of de minimis transfers

The corporation shall prescribe regulations which exempt de minimis transfers of assets from the requirements of this part.

(c) Written reciprocity agreements

This part shall not apply to transfers of assets pursuant to written reciprocity agreements, except to the extent provided in regulations prescribed by the corporation.

Section 4235, 29 U.S.C. § 1415

Transfers pursuant to change in bargaining representative

(a) Authority to transfer from old plan to new plan pursuant to employee participation in another multiemployer plan after certified change of representative

In any case in which an employer has completely or partially withdrawn from a multiemployer plan (hereafter in this section referred to as the "old plan") as a result of a certified change of collective bargaining representative occurring after September 25, 1980, if participants of the old plan who are employed by the employer will, as a result of that change, participate in another multiemployer plan (hereafter in this section referred to as the "new plan"), the old plan shall transfer assets and liabilities to the new plan in accordance with this section.

(b) Notification by employer of plan sponsor of old plan; notification by plan sponsor of old plan of employer and plan sponsor of new plan; appeal by new plan to prevent transfer; further proceedings

(1) The employer shall notify the plan sponsor of the old plan of a change in multiemployer plan participation described in subsection (a) of this section no later than 30 days after the employer determines that the change will occur.

(2) The plan sponsor of the old plan shall—

(A) notify the employer of—

(i) the amount of the employer's withdrawal liability determined under part 1 of this subtitle with respect to the withdrawal,

(ii) the old plan's intent to transfer to the new plan the nonforfeitable benefits of the employees who are no longer working in covered service under the old plan as a result of the change of bargaining representative, and

(iii) the amount of assets and liabilities which are to be transferred to the new plan, and

(B) notify the plan sponsor of the new plan of the benefits, assets, and liabilities which will be transferred to the new plan.

(3) Within 60 days after receipt of the notice described in paragraph (2)(B), the new plan may file an appeal with the corporation to prevent the transfer. The transfer shall not be made if the corporation determines that the new plan would suffer substantial financial harm as a result of the transfer. Upon notification described in paragraph (2), if—

(A) the employer fails to object to the transfer within 60 days after receipt of the notice described in paragraph (2)(A), or

(B) the new plan either—

(i) fails to file such an appeal, or

(ii) the corporation, pursuant to such an appeal, fails to find that the new plan would suffer substantial financial harm as a result of the transfer described in the notice under

paragraph (2)(B) within 180 days after the date on which the appeal is filed,

then the plan sponsor of the old plan shall transfer the appropriate amount of assets and liabilities to the new plan.

(c) Reduction of amount of withdrawal liability of employer upon transfer of appropriate amount of assets and liabilities by plan sponsor of old plan to new plan

If the plan sponsor of the old plan transfers the appropriate amount of assets and liabilities under this section to the new plan, then the amount of the employer's withdrawal liability (as determined under section 1381(b) of this title without regard to such transfer and this section) with respect to the old plan shall be reduced by the amount by which—

(1) the value of the unfunded vested benefits allocable to the employer which were transferred by the plan sponsor of the old plan to the new plan, exceeds

(2) the value of the assets transferred.

(d) Escrow payments by employer upon complete or partial withdrawal and prior to transfer

In any case in which there is a complete or partial withdrawal described in subsection (a) of this section, if—

(1) the new plan files an appeal with the corporation under subsection (b)(3) of this section, and

(2) the employer is required by section 1399 of this title to begin making payments of withdrawal liability before the earlier of—

(A) the date on which the corporation finds that the new plan would not suffer substantial financial harm as a result of the transfer, or

(B) the last day of the 180-day period beginning on the date on which the new plan files its appeal,

then the employer shall make such payments into an escrow held by a bank or similar financial institution satisfactory to the old plan. If the transfer is made, the amounts paid into the escrow shall be returned to the employer. If the transfer is not made, the amounts paid into the escrow shall be paid to the old plan and credited against the employer's withdrawal liability.

(e) Prohibition on transfer of assets to new plan by plan sponsor of old plan; exemptions

(1) Notwithstanding subsection (b) of this section, the plan sponsor shall not transfer any assets to the new plan if—

(A) the old plan is in reorganization (within the meaning of section 1421(a) of this title), or

(B) the transfer of assets would cause the old plan to go into reorganization (within the meaning of section 1421(a) of this title).

(2) In any case in which a transfer of assets from the old plan to the new plan is prohibited by paragraph (1), the plan sponsor of the old plan shall transfer—

(A) all nonforfeitable benefits described in subsection (b)(2) of this section, if the value of such benefits does not exceed the withdrawal liability of the employer with respect to such withdrawal, or

(B) such nonforfeitable benefits having a value equal to the withdrawal liability of the employer, if the value of such benefits exceeds the withdrawal liability of the employer.

(f) Agreement between plan sponsors of old plan and new plan to transfer in compliance with other statutory provisions; reduction of withdrawal liability of employer from old plan; amount of withdrawal liability of employer to new plan

(1) Notwithstanding subsections (b) and (e) of this section, the plan sponsors of the old plan and the new plan may agree to a transfer of assets and liabilities that complies with sections 1411 and 1414 of this title, rather than this section, except that the employer's liability with respect to the withdrawal from the old plan shall be reduced under subsection (c) of this section as if assets and liabilities had been transferred in accordance with this section.

(2) If the employer withdraws from the new plan within 240 months after the effective date of a transfer of assets and liabilities described in this section, the amount of the employer's withdrawal liability to the new plan shall be the greater of—

(A) the employer's withdrawal liability determined under part 1 of this subtitle with respect to the new plan, or

(B) the amount by which the employer's withdrawal liability to the old plan was reduced under subsection (c) of this section, reduced by 5 percent for each 12-month period following the effective date of the transfer and ending before the date of the withdrawal from the new plan.

(g) Definitions

For purposes of this section—

(1) "appropriate amount of assets" means the amount by which the value of the nonforfeitable benefits to be transferred exceeds the amount of the employer's withdrawal liability to the old plan (determined under part 1 of this subtitle without regard to section 1391(e) of this title), and

(2) "certified change of collective bargaining representative" means a change of collective bargaining representative certified under the Labor-Management Relations Act, 1947 [29 U.S.C. §§ 141 et seq.], or the Railway Labor Act [45 U.S.C. §§ 151 et seq.].

LABOR-MANAGEMENT RELATIONS ACT, AS AMENDED

Section 302(a)-(e), 29 U.S.C. § 186(a)-(e)

Restrictions on financial transactions

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own chosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting com-

merce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) Request, demand, etc., for money or other thing of value

(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in section 10102 of Title 49) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) Exceptions

The provisions of this section shall not be applicable

* * * *

(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents

jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefits of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds

held therein cannot be used for any purpose other than paying such pensions or annuities;

* * * *

(d) Penalty for violations

(1) Any person who participates in a transaction involving a payment, loan, or delivery of money or other thing of value to a labor organization in payment of membership dues or to a joint labor-management trust fund as defined by clause (B) of the proviso to clause (5) of subsection (c) of this section or to a plant, area, or industry-wide labor-management committee that is received and used by such labor organization, trust fund, or committee, which transaction does not satisfy all the applicable requirements of subsections (c)(4) through (c)(9) of this section, and willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment, loan, money, or other thing of value under subsections (c)(4) through (c)(9) violates this subsection, shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

(2) Except for violations involving transactions covered by subsection (d)(1) of this section, any person who willfully violates this section shall, upon conviction thereof, be guilty of a felony and be subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both; but if the value of the amount of money or thing of value involved

in any violation of the provisions of this section does not exceed $1,000, such person shall be guilty of a misdemeanor and be subject to a fine of not more than $10,000, or imprisoned for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

INTERNAL REVENUE CODE

Sections 413(a) and (b)(3), 26 U.S.C. §§ 413(a) and (b)(3)

COLLECTIVELY BARGAINED PLANS, ETC.

(a) Application of Subsection (b).—Subsection (b) applies to—

(1) a plan maintained pursuant to an agreement which the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, and

(2) each trust which is a part of such plan.

(b) General Rule.—If this subsection applies to a plan, notwithstanding any other provisions of this title—

* * * *

(3) Exclusive benefit. — For purposes of section 401(a), in determining whether the plan of an employer is for the exclusive benefit of his employees and their beneficiaries, all plan participants shall be considered to be his employees.

TREASURY REGULATIONS

26 C.F.R. § 1.414(l)-1(b)(3) Mergers and consolidations of plans or transfers of plan assets

* * * *

(b) **Definitions:** For purposes of this section:

* * * *

(3) *Transfer of assets or liabilities.* A "transfer of assets or liabilities" occurs when there is a diminution of assets or liabilities with respect to one plan and the acquisition of these assets or the assumption of these liabilities by another plan. For example, the shifting of assets or liabilities pursuant to a reciprocity agreement between two plans in which one plan assumes liabilities of another plan is a transfer of assets or liabilities. However, the shifting of assets between several funding media used for a single plan (such as between trusts, between annuity contracts, or between trusts and annuity contracts) is not a transfer of assets or liabilities.

* * * *

REGULATIONS OF THE PENSION BENEFIT GUARANTY CORPORATION

29 C.F.R. § 2670.3 Merger and transfer definitions

For purposes of Part 2672—

* * * *

"Transfer" and "transfer of assets or liabilities" mean a diminution of assets or liabilities with respect to one plan and the acquisition of these assets or the assumption of these liabilities by another plan or plans (including a plan that did not exist prior to the transfer). However, the shifting of assets or liabilities pursuant to a written reciprocity agreement between two multiemployer plans in which one plan assumes liabilities of another plan is not a transfer of assets or liabilities. In addition, the

shifting of assets between several funding media used for a single plan (such as between trusts, between annuity contracts, or between trusts and annuity contracts) is not a transfer of assets or liabilities.

(2)

No. 91-610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,

Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should *certiorari* be granted so that this Court may review whether the Court of Appeals correctly held that the petitioner multiemployer pension and welfare trust funds were structurally defective under section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5), unless they transferred to the respondent multiemployer pension and welfare funds surplus reserves attributable to contributions made on behalf of respondent employees, because a significant number of those employees previously covered under petitioner trust funds transferred to coverage under respondent trust funds.

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COUNTERSTATEMENT OF THE CASE

Preliminary Statement

Respondents, the management trustees of the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds (collectively, the "Southern Funds"), the employers and management companies[1] that are members of the Southern New York Residential Health Care Facilities Association, Inc. (the "Southern Employers"), and individual employees of the Southern Employers ("Southern Employees") respectfully request that this Court deny the petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit. The reasons put forth by Petitioners to urge this Court to grant *certiorari* do not demonstrate "special and important reasons" for granting the writ, as required by Rule 10 of the Rules of the United States Supreme Court.

Counterstatement Of Facts

Petitioners, Local 144 Nursing Home Pension Fund ("Greater Pension Fund"), New York City Nursing Home - Local 144 Welfare Fund ("Greater Welfare Fund") and the individual trustees of the Greater Funds (collectively, the "Greater Funds"), make certain factual misstatements and omissions in the Statement of the Case presented in the Petition ("Pet.").

Until 1981 the Southern Employers were members of Greater New York Health Care Facilities Association, Inc., a multiemployer bargaining association (JA 13a, 135a, 160a).[2] The Southern

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1 Respondent corporations have no parent companies or partially-owned subsidiary companies. Sup. Ct. R. 29.1.

2 Citations are to the Joint Appendix ("JA") filed with the Court of Appeals.

Employers made contributions to the Greater Welfare Fund and the Greater Pension Fund on behalf of their employees for whom contributions were required to be made (id.). The majority of the Southern Employers had been making contributions to the Greater Funds for nearly fifteen years (JA 402a-403a, 408a, 436a-437a, 496a, 522a).

The Southern Employers withdrew from Greater New York in 1981 and became members of the Southern New York Residential Health Care Facilities Association, Inc., a nonprofit trade association (JA 13a, 160a). The Southern Employers continued to contribute to the Greater Funds (JA 13a-14a, 160a). In November 1984, following the expiration and termination of each Southern Employer's 1981 - 1984 collective bargaining agreement with Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees Union, SEIU, AFL-CIO ("Local 144"), the Southern Employers executed new individual three-year collective bargaining agreements with Local 144, effective March 31, 1984 through March 31, 1987 (JA 14a, 162a). During negotiations leading to these agreements, the Southern Employers and Local 144 discussed the possibility of establishing new pension and welfare funds for the benefit of the Southern Employees (JA 14a, 161a-162a). The Southern Employers had become increasingly concerned that the Greater Funds were not administered fairly but instead, certain employers received, in effect, "special deals," and were not contributing the amounts they were obligated to contribute to the Greater Funds (JA 502a-503a, 511a). The Southern Employers, who employed approximately 1,981 employees covered by the Greater Funds (JA 18a), believed these special deals threatened the financial condition of the Greater Funds, consequently threatening the employees' expectations of welfare and pension benefits (JA 502a-503a, 511a).

Each of the collective bargaining agreements that the Southern Employers and Local 144 executed in November 1984 contained an identical provision that Local 144 and the Southern Employers would establish the Southern Funds and provide employees with the same level of benefits as provided by the Greater Funds as of April 1,

1984 (JA 41a). The Southern Employers negotiated on the basis that the Greater Funds would be obligated under section 302(c)(5) of the LMRA to transfer that portion of its reserves attributable to contributions made by the Southern Employers on behalf of the nearly 2,000 Southern Employees, who represented approximately 20% of the employees covered by the Greater Funds (JA 161a, 221a).

On December 1, 1985 the Southern Funds became operational, providing coverage to the nearly 2,000 employees of the Southern Employers (JA 18a, 165a). The Greater Funds and the Southern Funds are Taft-Hartley multiemployer trust funds established and maintained pursuant to section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5) (JA 18a, 134a-135a). The board of trustees of each of the Southern Funds are comprised of eight persons, four trustees designated by Local 144 as union-appointed trustees and four trustees appointed by the Southern Association as employer-appointed trustees (JA 84a, 117a). At all relevant times, the four union-appointed trustees of the Southern Funds were the same individuals who acted as the four union-appointed trustees of the Greater Funds (JA 127a, 129a, 135a).

At the time of the transfer of employees, the Greater Funds possessed reserves that were derived, in part, from contributions received from the Southern Employers on behalf of their participant employees and/or from the income therefrom (JA 156a-158a).[3]

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3 The Greater Funds claim, without any factual support in the record, that this "case does not raise issues regarding excess assets in benefit plans" because the Greater Welfare Fund "has been struggling to maintain health levels" and the Greater Pension Fund "provides a modest maximum pension." Pet. at 3. The current financial condition of the Greater Funds is irrelevant. The relevant inquiry is the financial condition of the Greater Funds at the time the Southern Employees were transferred to the Southern Funds. Further, the Greater Funds' allegations about the financial condition of the Greater Welfare Fund were not raised in the district court or the court of appeals and therefore, are not properly before this Court for review. *See Patrick v. Burget*, 486 U.S. 94, 99 n. 5 (1988).

These reserves have not and will not be used by the Greater Funds to provide benefits to the Southern Employees (id.).

II

REASONS THIS COURT SHOULD DENY THE PETITION FOR CERTIORARI

This case does not present "special and important reasons" necessary to justify granting a writ of *certiorari*. The Second Circuit's decision does not address an important, unsettled issue of federal law. Nor does the decision conflict with applicable decisions of the Supreme Court.

The decision of the Second Circuit also does not conflict with the decision of any other court of appeals. There is no other circuit court decision squarely on the issue decided by the Second Circuit. To the extent other circuit court decisions address the question of whether a trust fund is structurally defective under section 302(c)(5) of the LMRA, there is no circuit court decision which takes a position contrary to the position of the Second Circuit. The few cases from the Ninth and Seventh Circuit Courts cited by Petitioners are readily distinguishable on the facts and questions of law presented in those cases.

A. THIS CASE IS LIMITED IN EFFECT AND DOES NOT RAISE AN IMPORTANT ISSUE OF UNSETTLED FEDERAL LAW

The decision of the Court of Appeals in the instant case is limited to a specific factual situation that rarely has been the subject of litigation. The Court of Appeals addressed only the question of whether a multiemployer benefit plan with surplus assets is structurally defective under section 302(c)(5) of the LMRA because it did not transfer surplus assets to another multiemployer benefit plan when a significant number of employees transferred from coverage under the first plan to the second plan. The Second

Circuit's decision is reprinted at pages 1a-12a of the Appendix to the Petition ("Pet. App.").

In reaching its conclusion, the Second Circuit followed its 1984 decision in *Local 50, Bakery & Confectionary Workers Union v. Local 3, Bakery & Confectionary Workers Union*, 733 F.2d 229 (2d Cir. 1984). As in the instant case, *Local 50* involved a situation in which a significant number of employees, representing all of the employees of an employer, transferred from one pooled multiemployer benefit plan to another pooled multiemployer benefit plan. Contrary to Petitioners' melodramatic pronouncement that the Second Circuit's interpretation of section 302(c)(5) of the LRMA is a "cancer" that will "kill" multiemployer plans (Pet. at 11), there are only a few decisions that deal with this issue. Apart from *Local 50* and the case at bar, there is only one other court that has ordered a transfer of excess reserves between employee benefit plans under the LMRA. *See Operative Plasterers and Cement Masons Int'l Ass'n Local 202 v. Board of Trustees of the Plastering Industry Welfare and Pension Trust Funds*, 710 F. Supp. 42, 46 (E.D.N.Y.) (court ordered a local union to transfer pension and welfare benefit reserves contributed on behalf of the employees of another local union), *appeal dismissed*, 888 F.2d 1376 (2d Cir. 1989.

Federal courts already have rejected the argument that a transfer of reserves is required every time employees leave a multiemployer benefit plan. In *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 173-74 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985), the Second Circuit distinguished its decision in *Local 50* and refused to order a transfer under section 302(c)(5) when only a few employees of an employer transferred to another plan. Citing to *O'Hare*, the Seventh Circuit also rejected a claim for a transfer of reserves under section 302(c)(5) of the LMRA. *Stinson v. Ironworkers Dist. Council of Southern Ohio and Vicinity Benefit Trust*, 869 F.2d 1014, 1021 (7th Cir. 1989).

The determination of whether a transfer of reserves between employee benefit plans is necessary to remedy a structural defect under section 302(c)(5) of the LMRA turns on the particular facts of

each case. The issue is limited to situations in which there is an excess of assets over liabilities in a multiemployer benefit plan that are attributable in part to contributions made on behalf of the transferred employees. It is limited further to benefit trust funds that are governed by the LMRA. It is appropriate for this Court to decline to review a decision when the decision is based on specific factual details that are not likely to be found in other cases. *Vasquez v. United States*, 454 U.S. 975, 977 (1981).

Petitioners attempt to create an important issue of unsettled federal law by mischaracterizing the holding of the Second Circuit and asserting that the Employee Retirement Income Security Act of 1974, *as amended* ("ERISA"), 29 U.S.C. §§ 1001-1461 (1985), rather than the LMRA, governs the disposition of this case and would yield a different result. Pet. at 6-8.[4] The authority of federal courts to review employee benefit plans under section 302 of the LMRA is well-settled. In a case involving the interpretation of a welfare plan, this Court stated, "[i]t is, of course, clear that compliance with the specific standards of § 302(c)(5) in the administration of welfare funds is enforceable in federal district courts under § 302(e) of the LMRA." *United Mine Workers of Am. Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573 n.12 (1982); *see also Arroyo v. United States*, 359 U.S. 419, 426-27 (1959).

Congress intended both the LMRA and ERISA to govern multiemployer benefit plans. In enacting ERISA, Congress stated expressly that the LMRA would continue to apply to employee benefit plans. "There are essentially three federal statutes which, although accomplishing different purposes and vested within different federal departments for enforcement, are all compatible in their regulatory responsibilities." S. Rep. No. 127, 93d Cong. 1st

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4 Petitioners characterize the court's holding, for example, as a mandate to pay assets to an employer in violation of ERISA. Pet. at 15. The Second Circuit's decision, however, authorizes only a reallocation of reserves among multiemployer benefit plans and therefore, does not constitute a payment of assets from a trust fund to an employer.

Sess. 4 (1973), *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, at 590 (1976). One of these federal statutes is the LMRA.

There is nothing in the statutory language or legislative history of ERISA or the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") that supports the proposition that Congress intended to repeal section 302(c)(5) of the LMRA. Congressional intent to repeal a statute "'must be clear and manifest.'" *Morton v. Mancari*, 417 U.S. 535, 551 (1974) *(quoting United States v. Borden Co.*, 308 U.S. 188, 198 (1939)). Absent a clearly expressed intent to repeal, federal courts must give effect to two statutes on the same subject. *See, e.g., Mobile, Alabama-Pensacola, Florida Bldg. and Constr. Trades Council v. Daugherty*, 684 F. Supp. 270, 282 (S.D. Ala. 1988) (district court reconciles the terms of ERISA and the LMRA dealing with the tenure of trustees).

The Second Circuit's decision under the LMRA in the instant case is reconcilable with the provisions in ERISA dealing with transfers of assets and liabilities between multiemployer pension plans. Congress mandated a transfer of assets and liabilities between multiemployer pension plans in cases where there was a certified change in the collective bargaining representative. § 4235 of ERISA, 29 U.S.C. § 1415. Congress did *not* state, however, that this was the only time that a transfer was required. Further, Congress did not provide any specific guidelines in ERISA dealing with the transfer of assets and liabilities between welfare plans.

Petitioners also attempt to create an important issue of unsettled federal law by claiming that the Second Curcuit's interpretation of the language of section 302(c)(5) is unreasonable. Pet. at 8. Section 302(c)(5) of the LMRA provides that employer contributions made to a trust fund must be used

> "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the

employees of other employers making similar payments, and their families and dependents). . . ."

29 U.S.C § 186(c)(5). The Second Circuit found that, because all of the Southern Employees transferred out of the Greater Funds, the pooled monies held in reserve by the Greater Funds would not be used for the benefit of the Southern Employees "jointly with the employees of other employers." Pet. App. at 8a. Instead, the Greater Welfare Fund would use all of its pooled reserves to pay benefits to employees other than the Southern Employees. The Greater Pension Fund similarly would use its pooled reserves to pay pension benefits to employees of other employers, with the limited exception of certain pension benefits to Southern Employees vested in the Greater Pension Plan. Unless there was a transfer of an aliquot share of the surplus reserves to the Southern Funds, the Southern Employees would be deprived of the benefit of the contributions that had been made on their behalf to the Greater Funds in lieu of wages.

B. THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH SUPREME COURT PRECEDENT

The decision by the Court of Appeals in this case does not conflict with any decisions of this Court. Petitioners attempt to create a conflict by citing to this Court's reasoning in *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979), for the proposition that ERISA, rather than the LMRA, controls the issue in this case. The reasoning in *Daniel* is inapplicable to the case at bar.

In *Daniel*, the Supreme Court refused to extend the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 to allegations that a union and a pension fund trustee made certain misstatements and omissions relating to a noncontributory, compulsory pension plan. 439 U.S. at 570. This Court based its reasoning on the fact that there was no evidence that Congress ever thought the pension plans at issue were subject to federal regulation as securities. 439 U.S. at 563.

Unlike the Securities Acts in *Daniel*, Congress enacted section 302 of the LMRA specifically to regulate multiemployer trust funds. Section 302(c)(5) establishes certain statutory requirements, not found in ERISA, that must be met to permit employer contributions to multiemployer plans.

The decision of the Court of Appeals also does not conflict with the other Supreme Court decisions cited by petitioners. In *Robinson*, 455 U.S. 462, 571-72 (1982), this Court stated that, while federal courts have authority to examine employee benefit plans under the LMRA, federal courts cannot review for reasonableness the provisions of a collective bargaining agreement under section 302(c)(5) of the LMRA.[5] The Second Circuit's decision here does not interpret any provisions of a collective bargaining agreement. Pet. App. at 8a.

The decision of the Court of Appeals in the instant case also does not conflict with this Court's decisions in *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) or *Arroyo v. United States*, 359 U.S. 419 (1959). In *Amax Coal*, this Court held that the employer-selected trustees of a Taft-Hartley trust fund are not representatives of the employer for the purposes of collective bargaining. 453 U.S. at 330. This Court reviewed the legislative history of section 302(c)(5), finding that it was intended to ensure that employee benefit trust funds are legitimate trust funds subject to the requirements of long-established fiduciary principles. Id. at 330-31. There is nothing in the decision of the Second Circuit in the case at bar which conflicts with the *Amax Coal* decision.

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5 Further, the Second Circuit's decision in the instant case does not conflict with this Court's observation in *Robinson* that the conditions set forth in section 302(c)(5) do not place restrictions on the allocation of the funds among the persons protected by section 302(c)(5). 455 U.S. at 572. This observation was made in the context of the Court's rejection of a claim that a provision in the collective bargaining agreement distinguishing between the benefits available to widows of pensioners and widows of pension-eligible mine workers had to meet a test of reasonableness under section 302(c)(5).

Similarly, the decision of the Court of Appeals does not conflict with this Court's decision in *Arroyo*, 359 U.S. 419 (1959). In *Arroyo*, this Court noted that Congress did not intend section 302(c)(5) to duplicate state criminal laws. Instead, Congress enacted section 302(c)(5) to establish "specific standards . . . to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." 359 U.S. at 426. The decision of the Second Circuit furthers that congressional policy as stated by this Court by reallocating benefit reserves to the employees for whom the contributions were made in accordance with the statutory language of section 302(c)(5).

C. THE SECOND CIRCUIT'S DECISION DOES NOT CREATE A CONFLICT IN THE CIRCUIT COURTS OR VIOLATE ERISA

Petitioners claim that because the Second Circuit's decision "is effectively requiring a return of employer contributions," it creates a "clear conflict" in the circuits and violates ERISA. Pet. at 15. The Second Circuit's decision does not order a return of contributions to any Southern Employer but a transfer of a share of reserves between multiemployer benefit plans when a significant number of employees transfer from one set of multiemployer plans to another set of multiemployer plans. Petitioners do not cite to any cases that conflict with this holding. The absence of any conflict among the circuit courts makes the exercise of *certiorari* jurisdiction in the instant case inappropriate. *See Vasquez*, 454 U.S. at 976.

The Court of Appeals ordered "the Greater Funds [to] reallocate to the Southern Funds that portion of reserves which represent contributions on behalf of the Southern Employees." Pet. App. at 11a. The transfer of reserves between the multiemployer benefit plans is not a return of contributions to the Southern Employers. Although a transfer of reserves may benefit the Southern Employers indirectly because the financial condition of their employees' welfare and pension funds would be

strengthened, this indirect benefit is not a "return" of any contributions previously made by a Southern Employer to the Greater Funds.[6]

Petitioners cite to two private letters rulings issued by the Internal Revenue Service ("IRS") which they claim support their argument that the transfer of reserves here is a return of contributions to the Southern Employers. The IRS rulings are inapposite. In one ruling, the IRS considered whether the excess assets of a terminated defined benefit plan, which may revert to the employers, constitute taxable income if the assets were transferred immediately to a defined contribution plan. Priv. Ltr. Rul. 89-48-032 (Sept. 6, 1989). The IRS determined that because the excess assets would be taxable if reverted to the employers, the excess assets also are taxable if a defined benefit plan was terminated and assets transferred to a defined contribution plan. The Greater Funds are not terminating. Their excess assets cannot revert to contributing employers and would not be transferred to a defined contribution plan.

In the second IRS ruling cited by Petitioners, the IRS determined that an employer, which sponsored a defined benefit plan which it intended to terminate, could not satisfy its contractual obligations to a government agency through a distribution of the plan assets. Priv. Ltr. Rul. 91-36-017 (June 10, 1991). The IRS found that this would constitute, in effect, a reversion of assets to the employer because the employer would otherwise have to use its general corporate accounts to satisfy its liability. In this case, the transfer of reserves to the Southern Funds is not to satisfy any contractual liability owed to the Southern Employers by the Greater Funds.

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6 Because the transfer of reserves is not a return of contributions to the Southern Employers, there is no violation of ERISA's provisions restricting the transfer of assets to the benefit of contributing employers. 29 U.S.C. § 1103(c)(1). Similarly, because the Southern Employers have made no contention that they are entitled to a return of contributions, Petitioners' argument that ERISA has specific rules regarding the return of contributions is irrelevant.

Because the decision of the Second Circuit does not authorize the return of contributions to any employer, it does not conflict with the Ninth Circuit's decision in *Award Service, Inc. v. Northern Cal. Retail Clerks Union and Food Employers Joint Pension Trust Fund*, 763 F.2d 1066 (9th Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986). In that case, the Ninth Circuit held that an employer did not have a private right of action under LMRA section 302(c)(5) for a return of contributions made to a pension fund by mistake. 763 F.2d at 1071.- The Southern Employers do not seek a return of any contribution made by them to a trust fund on behalf of their employees. The Second Circuit's decision does not create a private right of action for the return of employer contributions. The Ninth Circuit decision in *Award Service* does not create a "clear conflict" between the circuit courts because it addresses an issue not present in the instant case.

Similarly, the Second Circuit's decision does not conflict with the Seventh Circuit's decision in *Stinson*, 869 F.2d 1014 (7th Cir. 1989). In *Stinson*, the Seventh Circuit discussed the Second Circuit's decision in *Local 50*, and distinguished it on its facts, finding that it did not "compel a different result." 869 F.2d at 1021. The Seventh Circuit instead followed the Second Circuit's reasoning in *O'Hare*, 740 F.2d 160 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985). The *Stinson* court noted that in *O'Hare*, the Second Circuit rejected a claim for a transfer of funds from a multiemployer pension plan when only a few employees left the pension plan, "distinguishing *Local 50* on several grounds." Id. The Seventh Circuit did not find its decision in *Stinson* in conflict with the Second Circuit.

The Second Circuit's decision also is consistent, rather than conflicting, with a Ninth Circuit case cited by petitioners. In *British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371, 378 (9th Cir. 1989), the Ninth Circuit found that a transfer of assets from a multiemployer plan to three successor trust funds after the plan ceased operations and its participants transferred was consistent with section 302(c)(5). The Ninth Circuit rejected an argument that the transferred assets

had to be restricted to the particular employees transferred. The Second Circuit's holding does not require multiemployer funds to tie the benefits of employee-participants to their employer's individual contributions. Pet. App. at 10a. Nor does it prohibit a multiemployer plan from pooling resources for the benefit of all participants. In fact, the Second Circuit ordered a reallocation of a portion of reserves to the Southern Funds without requiring that those funds be used only for employees who transferred from the Greater Funds to the Southern Funds. Pet. App. at 11a.

CONCLUSION

Based on the foregoing reasons, this Court should deny the petition for writ of *certiorari* to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,
v.
NICHOLAS DEMISAY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Petitioners submit this reply in support of our Petition for a Writ of Certiorari ("Petition"). We demonstrated in our Petition that the questions presented are substantial and important. We demonstrated that the opinion of the Court of Appeals cannot be reconciled with express provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, and the policies underlying that legislation, and that it threatens to undermine the multiemployer segment of the private pension system in the United States. The troubling implications and precedential impact of the Second Circuit's opinion are underscored and analyzed by two briefs *amicus curiae* filed in support of the Petition.[1] The basic thrust of the Respondents' brief in oppo-

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[1] Motion for Leave to File Brief *Amicus Curiae* and Brief of *Amicus Curiae* Central States, Southeast and Southwest Areas Pen-

sition ("Opp. Br.") is to attempt, through misleading statements of the case, to minimize the impact that the Second Circuit's erroneous legal and policy positions will have on employee benefit plans governed by ERISA.

1. Respondents begin by asserting that the issue addressed by the Second Circuit was whether "surplus" reserves or assets must be transferred from one multiemployer benefit plan to another. (Opp. Br. at 1, 4, 8). "Surplus" reserves or assets have not been the subject of the present case in either the Court of Appeals or the District Court. Neither of those courts rendered their decisions with reference to any "surplus." Indeed, the term "surplus" does not even appear in the opinions of either of those courts.

The issue addressed by the Court of Appeals and the District Court is whether assets or reserves of one multiemployer benefit plan are required by law to be transferred from one multiemployer benefit plan to another (Petition at 2a (Court of Appeals), 13a (District Court)). Respondents did not limit their claim to assets that were "surplus." The claim of the Respondents and the holding of the Court of Appeals measure the claim in terms of the "contributions" made by the withdrawing employers. (Joint Appendix at 388a-89a, 390a-91a; Petition at 11a-12a). As dealt with by the courts below, the level of plan assets or reserves may or may not have been at an adequate level of funding, let alone a "surplus." There was no inquiry or definition regarding any "surplus" by the courts below. The question addressed by the Court of Appeals and is presented to this Court is whether a transfer of assets is required regardless of the level of funding of the multiemployer benefit plan from which money is sought to be extracted. Accord-

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sion Fund in Support of Petitioners; Motion for Leave to File a Brief *Amicus Curiae* of the National Coordinating Committee for Multiemployer Plans in Support of Petitioners.

ingly, the question is as stated in the Petition and it has nothing to do with "surplus" assets or reserves.

2. Respondents say that the issue addressed by the Second Circuit involved the question whether plan assets must be transferred from one multiemployer benefit plan to another "when a significant number of employees" left the first plan and later became participants in a second plan. (Opp. Br. at 4). The Second Circuit's statement of the question before it contains no reference whatsoever to "a significant number of employees." (Petition at 2a). Instead, the Second Circuit's reference point is "when an employer leaves pension and welfare trust funds in favor of another set of trust funds." (*Id.*). Accordingly, the issue posed to this Court relates to one (or a few) employers withdrawing from a multiemployer benefit plan, and does not raise an issue relating to the proportion of the plan's participants involved.

3. Respondents say that the "Second Circuit's decision under the LMRA in the instant case is reconcilable with the provisions of ERISA dealing with transfers of assets and liabilities between multiemployer pension plans." (Opp. Br. at 7). The Respondents conveniently ignore Sec. 4231 of ERISA with which the Second Circuit's decision is patently irreconcilable. ERISA Sec. 4231 provides that "a plan sponsor may not cause a multiemployer plan to . . . engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such . . . transfer satisfies the requirements of subsection (b)." 29 U.S.C. Sec. 1411. That the statutory prerequisites for such a transfer have not been met is not controverted. ERISA requires that any such asset transfer be accompanied by a transfer of liabilities. Moreover, ERISA requires advance notice to the Pension Benefit Guaranty Corporation so that it can determine whether the transfer satisfies the statutory requirements. 29 U.S.C. Sec. 1411(b)(1), (c). Apparently, it is the position of the Respondents and the Second Circuit that they can bypass the scrutiny of the Pension Benefit Guaranty Corporation.

4. Respondents, in their counterstatement of facts, suggest that there was mal-administration of the Greater Funds. (Opp. Br. at 2). It is improper for the Respondents to include that material. No such findings of fact were made below. Respondents' last amended complaint did not even contain any allegations of wrongdoing. Since wrongdoing was not put in issue, the record does not contain a basis for making any fact finding on the subject.

Respondents' misleading statements are a last-minute attempt to distort the questions as having only a narrow impact on the universe of multiemployer benefit plans. The contrary is true. If the Second Circuit's view of the law were to prevail generally, not only would clear Congressional policy as expressed in ERISA be flouted but the nation's multiemployer benefit plan system would be fatally undermined.

We demonstrated in our Petition and herein that the comprehensive regulation of benefit plans by ERISA is undercut by the view of the law expounded by the Court of Appeals. That the general application of the Second Circuit's view of the law would jeopardize multiemployer benefit plans throughout the nation is demonstrated in our Petition, supported by uncontroverted expert testimony in the record and supported by the multiemployer benefit plan community as evidenced by the *amicus curiae* briefs submitted in support of the Petition by the National Coordinating Committee for Multiemployer Plans and by the Central States, Southeast and Southwest Areas Pension Fund.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the Petition, the Court should grant the Petition for a Writ of Certiorari.

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Dated: November 21, 1991

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No. 91-610

In the Supreme Court of the United States

OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, ET AL., PETITIONERS

v.

NICHOLAS DEMISAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. 186(c)(5), requires the trustees of multiemployer benefit plans to transfer part of the plans' reserves to new multiemployer funds set up by employers who leave the plans.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.[1]

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[1] The Department of Labor and the Pension Benefit Guaranty Corporation (PBGC) each have an interest in this case because it involves the duties of the trustees of a multiemployer pension plan subject to the Labor-Management Relations Act of 1947 and the Employee Retirement Income Security Act of 1974 (ERISA). The Secretary of Labor has significant enforcement responsibilities under ERISA. The PBGC, a wholly-owned government corporation with independent litigating authority, 29 U.S.C. 1302(b)(1) (and which therefore appears in this Court through its own counsel), is responsible for administering and enforcing Title IV of ERISA, including the Multiemployer Pension Plan

STATEMENT

Concern about the "corruption of collective bargaining representatives through bribery of employee representatives by employers" led Congress to enact Section 302 of the Labor-Management Relations Act (LMRA), 29 U.S.C. 186. That provision broadly prohibits the transfer of money from employers to union officials. See *Arroyo* v. *United States*, 359 U.S. 419, 424-426 (1959). However, Section 302 contains several exceptions to this broad prohibition. One exception, which is pertinent to this case, allows employers to establish employee benefit plans by paying money "to a trust fund established by [the employees'] representative." 29 U.S.C. 186(c)(5). This provision, set forth in Section 302(c)(5), protects employees by imposing a number of requirements on the operation of such trust funds; this case involves interpretation of the requirement that the funds be used "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents)."[2]

Petitioners are multiemployer pension and welfare benefit funds (the Greater Funds) and their trustees.

Amendments Act of 1980. This brief reflects the views of the PBGC as well as the Department of Labor.

[2] Section 302(c)(5) also requires that a fund be established pursuant to a written agreement and that employers and employees be represented equally in administration of the fund. See 29 U.S.C. 186(c)(5)(A)-(C). Transfers of money in violation of Section 302 are criminal, 29 U.S.C. 186(d), and federal courts have jurisdiction to restrain violations of Section 302, 29 U.S.C. 186(e).

The Greater Funds were established pursuant to a collective bargaining agreement between a multi-employer bargaining association, the Greater New York Health Care Facilities Association, Inc. (the Greater Association), and Local 144 of the Hotel, Hospital, Nursing Home and Allied Services Employees Union. Pet. App. 2a-3a, 14a. Respondents include a group of employers (the Southern Employers), management companies, and employees (the Southern Employees) that broke away from the Greater Association and established new multiemployer pension and welfare funds (the Southern Funds) through collective bargaining with Local 144. Pet. App. 2a-3a, 13a-14a.

The collective bargaining agreements between the Southern Employers and Local 144 provide that "[n]o employee shall lose benefits as a result of transfer of his/her coverage" from the Greater Funds. Pet. App. 15a. The agreements also require the Southern Employers to provide the same level of benefits that the Greater Funds provided. *Id.* at 3a. With respect to employees whose rights under the Greater Funds' pension plan had not vested at the time of the withdrawal, the Southern Funds give credit for time served. Accordingly, an employee with, say, nine years of service under the Greater Funds would satisfy the ten-year vesting requirement of the Southern Funds after one year of additional service. At that point, the employee would be entitled to receive his full pension from the Southern Fund. With respect to employees whose benefits with the Greater Funds already had vested at the time of the withdrawal, the Southern Funds agreed to supplement the amount due from the Greater Funds so that the total amount received would equal the total amount the employee

would have received if his employer had not left the Greater Funds. Thus, the Greater Funds remained fully liable for all vested liabilities incurred as of the date of withdrawal. *Id.* at 3a-4a, 16a.

To help finance the Southern Funds, respondents sought to have petitioners transfer a portion of the assets of the Greater Funds to the Southern Funds. When petitioners refused, respondents commenced this action in the United States District Court for the Southern District of New York, arguing, among other things, that the Greater Funds violated the "sole and exclusive benefit" provision of Section 302(c)(5) and their fiduciary duties under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, by refusing to transfer a portion of the Greater Funds' assets to the Southern Funds.

The district court ruled in favor of petitioners on both grounds. Pet. App. 13a-29a. The court concluded that Section 302(c)(5) imposes a duty to transfer assets only when necessary to facilitate the right of employees to change their collective bargaining representative. Because Local 144 was the representative of the Southern Employees both before and after the withdrawal, the trustees were not required to transfer the funds under that construction of the LMRA. Pet. App. 19a-21a. The court also rejected respondents' claim that the trustees of the Greater Funds had violated ERISA by breaching their fiduciary duty to participants. *Id.* at 28a.

The court of appeals reversed. Pet. App. 1a-12a. The court concluded that Section 302(c)(5) requires a tight link between the use of funds in a multiemployer benefit plan and the specific employee on whose behalf the funds were contributed. The court stated that "[i]t is only just, said Congress, that the employe [*sic*] whose hour's work required the em-

ployer to make a payment of five cents to the trust fund be assured of reaping the benefit of that payment." *Id.* at 9a. The court further concluded that a failure to require the Greater Funds to pay reserves to the Southern Funds "would operate as a windfall to the Greater Funds." *Ibid.* The court rejected petitioners' reliance on the language of Section 302 (c)(5), which permits the funds' assets to be used not only for the benefit of the employees on whose behalf the funds were contributed, but for the benefit of "employees of other employers" who contributed to the same fund. *Id.* at 10a-11a. In the court's view, Section 302(c)(5) requires a transfer, notwithstanding the statutory language, whenever "there is no chance, actuarial or otherwise, that any of the 'employees of [the departing] employer' [other than employees whose benefits already had vested] will ever receive benefits based on their contributions." *Id.* at 11a. Because the court ruled that the transfer was required by Section 302(c)(5) of the LMRA, it did not address respondents' claim that the fiduciary duties imposed by ERISA also obligated petitioners to transfer a portion of the assets of the Greater Funds. *Id.* at 12a.[3]

DISCUSSION

The court of appeals erred in interpreting the Labor-Management Relations Act to require the trustees of multiemployer benefit plans to transfer

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[3] Nor did the court of appeals determine how much money the Greater Funds were required to transfer to the Southern Funds. It said that "[a]s a general principle, the district court should require that the Greater Funds reallocate to the Southern Funds that portion of the reserves which represent contributions on behalf of Southern Employees for liabilities undertaken by the Southern Funds." Pet. App. 11a.

part of their plan's reserves to new multiemployer funds whenever departing employers set up new funds. As the Court has recognized, withdrawal from multiemployer pension plans was one of the core problems that led Congress to enact the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). See *Pension Benefit Guaranty Corporation* v. *R.A. Gray & Co.*, 467 U.S. 717, 723 (1984). By holding that the Labor-Management Relations Act includes a per se rule requiring trustees to transfer funds, without considering the more finely tuned and comprehensive regulation of the subject matter by ERISA and the MPPAA, the court has ignored the complex framework that Congress created to deal with these problems. Moreover, not only did the Second Circuit err in its interpretation, the decision squarely conflicts with the decision of the Seventh Circuit in *Stinson* v. *Ironworkers District Council Benefit Trust*, 869 F.2d 1014, 1021 (1989). Accordingly, review by this Court is warranted.

1. The court of appeals erred by concluding that the LMRA, specifically Section 302(c)(5), establishes a per se rule that trustees of a multiemployer plan must transfer assets any time an employer withdraws from the plan. The fundamental premise on which that conclusion rests is this: Trustees who fail to hand over funds to a new multiemployer plan set up by withdrawing employers violate the LMRA by refusing to use the funds entrusted to them for the "sole and exclusive benefit" of the employees on whose behalf the funds were contributed. See Pet. App. 10a-11a.

The court of appeals' premise cannot be reconciled with the language of Section 302(c)(5) itself. That provision permits the use of such funds not only for

the "sole and exclusive benefit of the employees of [the] employer" who contributed them, but also for the benefit of "the employees of other employers making similar payments." Thus, Section 302(c)(5) does not require trustees of multiemployer funds to segregate payments made by each employer and to use such payments solely for the benefit of employees of the contributing employer; to the contrary, the statute permits trustees administering multiemployer plans to pool employer contributions for the purpose of paying benefits to *all* participants in the plan. The only requirement established by the provision at issue is that the trustees must use the funds for "the benefit of employees and their families and dependents, to the exclusion of all others." *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 570 (1982) (rejecting a claim that Section 302(c)(5) requires eligibility rules to be reasonable); see *Robinson*, 455 U.S. at 572 ("None of the conditions [specified in 302(c)(5)] places any restriction on the allocation of the funds among the persons protected by § 302(c)(5).").

The court of appeals' view that the LMRA grants employees a right to trace and claim the contributions of their particular employers is at odds not only with the language of the statute, but with the basic structure of multiemployer plans. Once contributions enter such plans, the funds are tied neither to the individual employees on whose behalf the contributions were made, nor to the workforce of the employer who made the contributions. For example, contributions made "on behalf of" an employee who leaves the plan before serving long enough for his pension to vest will never benefit that employee in any way. Those contributions, pooled with all other contributions made on behalf of all other employees, instead will

be used to defray the costs of benefits paid to other participants in the trust, including the employees of other employers. See *British Motor Car Distributors, Ltd.* v. *San Francisco Automotive Industries Welfare Fund*, 882 F.2d 371, 378 (9th Cir. 1989); *Stinson*, 869 F.2d at 1022; *Local Union No. 5* v. *Mahoning and Trumbull County Building Trades Welfare Fund*, 541 F.2d 636, 639 (6th Cir. 1976) ("That the [fund's] rule results in certain employers' contributions being used for other than their employees does not violate the 'sole and exclusive benefit' requirement. Such imprecision is part and parcel of a pooled fund specifically authorized through 29 U.S.C. § 186(c)(5)." (citations omitted)); cf. 26 U.S.C. 413(b)(3) (in determining whether a multiemployer benefit plan meets the "exclusive benefit" requirement of Section 401 of the Internal Revenue Code, all plan participants shall be considered to be the employees of a contributing employer); 26 C.F.R. 1.413-1(d) (regulation implementing Section 413(b)(3)). Similarly, an employee's right to receive vested benefits continues even if the employer withdraws from the plan or otherwise ceases making payments. See *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 567 n.7, 579 n.20 (1985); H.R. Rep. No. 869, 96th Cong., 2d Sess. Pt. I, at 53 (1980) (multiemployer pension plans are preferable because they "enabl[e] a plan participant to retain benefit credits earned * * * even though the employer subsequently ceases contributing to the plan[, so that other employers] have the burden of funding the unfunded benefit obligations for employees of a withdrawn employer").

In addition, the court of appeals' interpretation of Section 302(c)(5) stretches the language of the statute to further a purpose far afield from that at which

the provision is directed. As this Court has explained time after time, Section 302's general prohibition on employer payments to employee representatives reflects Congress's concern with "corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959) (footnotes omitted); see *Robinson*, 455 U.S. at 572 (noting Congress's concern "that pension funds administered entirely by union leadership might serve as 'war chests' to support union programs or political factions, or might become vehicles through which 'racketeers' accepted bribes or extorted money from employers"); *Walsh* v. *Schlecht*, 429 U.S. 401, 410-411 (1977); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 474 (1960) (Frankfurter, J., dissenting). Congress responded to that concern in Section 302 by enumerating specific standards "to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." *Arroyo*, 359 U.S. at 426; see *Robinson*, 455 U.S. at 572 (noting that "[e]ach of the specific conditions [in Section 302(c)(5)] is consistent with the nondiversion purpose"). Because the conduct at issue in this case poses no risk that assets will be diverted from participants to the benefit of union officials, the purpose of the statute does not support the Second Circuit's broad interpretation of the language of Section 302(c)(5).

The court of appeals' error is made particularly clear by the court's unwillingness to pursue its ration-

ale to its logical conclusion. The court recognized the well-established rule that trustees are not required to transfer funds to a new plan whenever employees leave a plan. See *O'Hare* v. *General Marine Transport Corp.*, 740 F.2d 160, 173 (2d Cir. 1984) ("To claim that monies retained by the Funds contributed by an employer on behalf of all of its employees is not contributed 'for the sole and exclusive benefit of the employees of such employer' whenever some of the employees choose to leave the union and [the] fund would be an unfair and unrealistic construction of section 302(c)(5)."), cert. denied, 469 U.S. 1212 (1985). The court of appeals distinguished *O'Hare* on the ground that its rule was limited to situations in which "*some*, but not all, of an employer's employees" changed plans, Pet. App. 10a. By contrast, the court contended, judicial intervention is required when the employer leaves with all of its employees, because "there is no chance, actuarial or otherwise, that any of the 'employees of such employer' will ever receive benefits based on their contributions." *Id.* at 11a. But if the reason for judicial intervention is, as the court of appeals held, that Section 302(c)(5) is violated when "employees [do not] enjoy the 'sole and exclusive benefit' of their efforts," Pet. App. 9a, then there is no justification for the distinction articulated by the court of appeals. At bottom, if the statute requires contributions to be expended for the "sole and exclusive benefit" of the employees on whose behalf the contributions were made, trustees would be required to transfer funds whenever employees leave a plan, whether or not their employer leaves the plan as well. The obvious inconsistency of that result with the nature of multiemployer plans demonstrates that

the court of appeals' underlying premise is incorrect as well.[4]

2. In holding that Section 302(c)(5) of the Labor-Management Relations Act implicitly includes rules governing the transfer of assets among multiemployer pension plans, the court of appeals failed to recognize that Congress comprehensively regulated the topic in ERISA, as amended by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208. In particular, Subtitle E of Title IV of ERISA ("Special Provisions for Multiemployer Plans") contains specific provisions governing transfers of the assets of multiemployer pension plans, 29 U.S.C. 1411-1415, and Title I of ERISA imposes a general fiduciary duty on plan trustees that obligates them to consider asset transfer requests in good faith, 29 U.S.C. 1104.

a. Part 2 of Subtitle E ("Merger or Transfer of Plan Assets or Liabilities") expressly addresses the obligation of trustees to transfer assets in connection with the withdrawal of an employer from a multiemployer pension plan. First, Section 1411(a) prohibits any transfer of assets between multiemployer pension plans, except in accordance with the proce-

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[4] In any event, it is clear on the facts of this case that many of the Southern Employees will continue to receive benefits from the Greater Funds. First, as the court of appeals noted (Pet. App. 4a, 11a), those Southern Employees whose pension rights vested before the withdrawal will receive pensions from the Greater Funds. Also, the Greater Funds may be obligated to pay benefits to Southern Employees whose benefits had not vested at the time of withdrawal if those employees subsequently go to work for an employer that contributes to the Greater Funds. See 29 U.S.C. 1053(b)(3), 1054(e).

dures set forth in Section 1411(b).[5] Subsection (b), in turn, requires notice to the Pension Benefit Guaranty Corporation (PBGC) at least 120 days before the proposed transfer, Section 1411(b)(1), and imposes a number of substantive restrictions designed to prevent certain transfers that would harm participants, Section 1411(b)(2)-(4).[6] In our view, the court of appeals should not have ordered petitioners to transfer assets between pension plans without considering whether the transfer satisfied the requirements of Section 1411(b).[7]

Second, Section 1415 requires plan sponsors to transfer assets in one circumstance only: when an employer has withdrawn from a plan as a result of a change of collective bargaining representative and the covered employees will be covered by a new multiemployer plan. Because Local 144 continued to represent the affected employees after the Southern Employers' withdrawal, Section 1415 did not require a transfer.

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[5] "[A] plan sponsor may not cause a multiemployer plan to * * * engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such * * * transfer satisfies the requirements of subsection (b) of this section."

[6] Section 1411(b)(2) provides that no participant's accrued benefit may be lower immediately after the transfer than it was immediately before the transfer. Section 1411(b)(3) provides that a transfer may not occur unless benefits are not expected to be suspended. Section 1411(b)(4) requires a recent actuarial valuation of the affected plans.

[7] To be sure, petitioners did not argue to the court of appeals that the transfer violated Section 1411. Nevertheless, at a minimum the court of appeals should have required the statutory notice to PBGC to be given before consummation of any transfer.

Finally, Section 1414(a) addresses asset transfers indirectly, by providing that any rules a plan adopts to govern transfers must "not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities." That provision imposes no obligation to transfer either assets or liabilities; it merely mandates that if a plan decides to transfer liabilities, any related transfer of assets must comply with uniformly-applied plan rules that do not unreasonably restrict the transfer of assets in connection with the transfer of liabilities. Accordingly, because no liabilities were transferred from the Greater Funds pension plan to the Southern Funds pension plan, Section 1414(a) has no application to this case. See *Vornado, Inc.* v. *Trustees of Retail Store Employees' Union Local 1262*, 829 F.2d 416, 419-421 (3d Cir. 1987).[8]

b. A fundamental precept of ERISA is this: Plan trustees must comply with "strict fiduciary standards" in the discharge of their duties. See *NLRB* v.

[8] In explaining how reallocation should be fashioned on remand, the court of appeals stated that reserves should be transferred from the Greater Funds in proportion to the "liabilities now undertaken by the Southern Funds." Pet. App. 11a. The court of appeals apparently was referring to the fact that the Greater Funds owe no payments to employees who failed to vest, while the Southern Funds will make payments to those employees based on all of their years of service if they ultimately vest. But as the district court explained, "an assumption of liability for * * * past service credit is not the same as a transfer of liabilities from the Greater Funds to [the Southern Funds], since the latter implies that the Greater Funds has a preexisting obligation to those who left the plan, which simply is not the case here." *Id.* at 24a. Moreover, as discussed *supra*, at 3-4, the Greater Funds in fact retained all vested liabilities that had accrued at the time of withdrawal.

Amax Coal Co., 453 U.S. 322, 332 (1981). To this end, Section 404(a)(1)(B) of ERISA requires a fiduciary to

> discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries [and] with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

29 U.S.C. 1104(a)(1)(B). Similarly, trustees are prohibited from "act[ing] in any transaction involving the plan on behalf of a party * * * whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." ERISA Section 406(b)(2), 29 U.S.C. 1106(b)(2).[9]

ERISA's strict prohibitions protect plans against the risk that plan trustees will succumb to the temp-

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[9] Although this Court has recognized that Section 302(c)(5) of the LMRA implicitly imposes similar fiduciary duties on plan administrators by requiring them to hold plan assets "in trust," see *Amax Coal Co.*, 453 U.S. at 330, it is not clear whether the fiduciary duties created by the LMRA are enforceable in federal courts. See *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 573 n.12 (1982) ("The [*Amax Coal Co.*] Court did not decide, nor do we decide today, whether federal courts * * * are authorized to enforce those duties."). The question has limited practical importance in light of the ability of federal courts to enforce the similar duties imposed by ERISA. See 29 U.S.C. 1109(a) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable."); 29 U.S.C. 1132(a)(2) ("A civil action may be brought by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.").

tation to put their own interests ahead of those of the plan itself. See *Vornado*, 829 F.2d at 421 ("The trustees must reach all decisions guided by their fiduciary responsibilities; they must consider the welfare of the fund and the beneficiaries and are not free to reject all proposed transfers."). To be sure, legitimate considerations may suggest to the trustees that the best interests of the participants would be served by refusing to transfer assets. Thus, the new plan's failure to request a transfer of liabilities of the old plan (as appears to be the case here) tends to support a fiduciary decision not to transfer plan assets. In any case, prudence requires that trustees consider the short and long-term effects on the plan, whose benefit commitments, funding obligations, and currently available assets would be affected by the proposed transfer of funds. Finally, trustees should consider whether the proposed transfer complies with the asset transfer rules established by Title IV of ERISA, 29 U.S.C. 1411-1415. In sum, trustees must consider requests from departing employers in accordance with the general fiduciary duty ERISA imposes on them; the appropriate response will depend upon the specific circumstances of the existing plan and the requested transfer.[10]

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[10] The petition does not present a fiduciary-duty issue, because the court of appeals ruled in favor of respondents on the LMRA issue and thus had no occasion to consider respondents' claim that petitioners' refusal to transfer assets breached the fiduciary duties imposed by ERISA. See Pet. App. 12a. Two courts of appeals considering related fact patterns arising when single-employer plans split have concluded that trustees did not violate ERISA when they declined to transfer a portion of their plans' surplus to "spunoff" plans. See *Bigger* v. *American Commercial Lines, Inc.*, 862 F.2d 1341, 1347 (8th Cir. 1988); *Foster Medical*

3. The court of appeals' holding directly conflicts with the Seventh Circuit's holding in *Stinson* v. *Ironworkers District Council Benefit Trust*, 869 F.2d 1014 (1989). In that case, a local union and the employers with whom it had collective bargaining agreements withdrew from a multiemployer welfare fund to begin a new welfare fund. The union brought suit alleging that the trustees of the original fund violated Section 302(c)(5) when they promulgated an amendment prohibiting local unions withdrawing from the plan from obtaining an allocation of trust reserves proportional to their employers' contributions. Like respondents here, the union in *Stinson* argued that the original plan had violated the "sole and exclusive benefit" requirement of Section 302(c)(5). Specifically, the union contended that because "its active employees are no longer covered by the Trust, the money [previously] contributed for those employees * * * is being used not for their benefit, but for the benefit of other employees." 869 F.2d at 1020. The Seventh Circuit squarely rejected that argument:

> [B]ecause § 302(c)(5) does not place restrictions on the allocation of the funds among persons protected by § 302(c)(5), eligibility rules

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Corporation Employees' Pension Plan v. *Healthco, Inc.*, 753 F.2d 194, 199 (1st Cir. 1985). Those cases differ from the present case, however, because the trustees had transferred some liabilities, and had transferred sufficient assets to fund the transferred liabilities. See 29 U.S.C. 1058. The courts concluded that the employees participating in the spunoff plans had no claim for breach of fiduciary duty because they were protected adequately by compliance with Section 1058. See *Bigger*, 862 F.2d at 1347; *Healthco*, 753 F.2d at 199. In any event, this holding has no application to the case at bar, because Section 1058 does not apply to multiemployer plans.

> are valid under § 302(c)(5) so long as they result in a distribution of benefits only to employees on whose behalf contributions to the fund have been made. * * * Thus * * * the contributions from Local 22's employers are being used only for employees on whose behalf contributions to the fund were made—albeit not current employees of Local 22's employers. This does not violate the "sole and exclusive benefit" requirement.

Id. at 1022 (citations and internal quotation marks omitted).[11] The Seventh Circuit's analysis is directly contrary to the analysis of the court of appeals in this case.[12]

The need for uniformity of law on this issue is enhanced by its great practical significance. By granting employers a ready means to fund new plans, the court of appeals has made withdrawal from multiemployer plans more attractive. In light of the frequency with which employer withdrawals lead to

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[11] The *Stinson* court noted that certain individuals who already were receiving benefits would continue to receive benefits from the original plan. See 869 F.2d at 1022. The court stated, however, that its reasoning upholding the trustee's decision not to transfer assets would apply "even if no Local 22 employees remained in the fund." *Ibid.* In any event, the fact that some employees of the departing employer would continue to receive benefits does not distinguish *Stinson* from this case. See Pet. App. 11a (noting that "the already-vested pensioners" would continue to receive benefits from the Greater Funds).

[12] The petition presents an even more compelling case for not requiring a transfer under the LMRA, because this case involves a pension plan, for which asset transfers are covered by Title IV of ERISA; *Stinson* involved a welfare plan not covered by Title IV, and the Seventh Circuit nevertheless held that a transfer was not required.

litigation, the issue is likely to recur frequently.[13] Accordingly, in light of the square conflict in the courts of appeals and the manifest importance of the question presented, we believe plenary review is both appropriate and needed at this time.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1992

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[13] For another recent decision regarding an attempt to compel a transfer of assets between multiemployer plans, see *Sheet Metal Workers' Local 28* v. *Gallagher*, No. 91-5056 (3d Cir. Apr. 3, 1992).

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No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,
v.
NICHOLAS DEMISAY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans (the "NCCMP") respectfully moves for leave to file the accompanying brief *amicus curiae* to urge the Court to review the decision below that all employer contributions to a multiemployer plan cannot be used to provide benefits to all plan participants, without regard to who employed them. Petitioners have consented to the filing of this brief; Respondents have not.

The NCCMP is a nonprofit, tax-exempt organization that was formed after the enactment of the Employee Re-

tirement Income Security Act of 1974 ("ERISA") to participate in the development of employee benefits legislation and government regulations promulgated to implement ERISA and other laws affecting multiemployer plans.[1] Currently, more than one hundred ninety multiemployer plans and related international unions, located in at least thirty-seven states, are affiliated with the NCCMP.[2] These plans are representative of all of the nation's multiemployer plans, which cover more than one million workers. If left unchallenged, the decision below will have an adverse impact on all multiemployer plans and, therefore, will be particularly adverse to the interest of NCCMP affiliates, which represent the majority of participants in multiemployer plans.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to state the position of the trustees, participants, and beneficiaries of such plans. The NCCMP last participated as an *amicus curiae* before this Court in the case of *FMC Corp. v. Holliday*, 498 U.S. ——, 59 U.S.L.W. 4009 (1990).

In the instant case, we respectfully request this Court to review the issue of whether employer contributions to a multiemployer welfare or pension plan can be used for the benefit needs of all plan participants. The decision below would force plan trustees to operate multiemployer plans as aggregates of separate single employer plans, isolating the contributions of each employer to ensure that

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[1] ERISA was amended in 1980 by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208 (1980). The NCCMP has been recognized as having had a "significant impact" on this statute by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed., July 24, 1980) and S10100 (daily ed., July 29, 1980).

[2] Petitioners are not affiliated with the NCCMP.

they be used only for that employer's employees. The NCCMP submits that the decision below will have far-reaching, negative consequences for the effective administration of multiemployer plans, inasmuch as these plans are established and maintained to use pooled trust assets for the benefit of all plan participants.

The NCCMP will limit its discussion to the conflict between the decision below—that an employer's contributions cannot be used for the benefit of other employers' employees—and the express terms of governing federal law and its legislative history, as well as the interpretation of that law by the judiciary and the executive.

Based on the foregoing, the NCCMP respectfully moves for leave to file the accompanying brief *amicus curiae.*

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Dated: November 1991

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONERS

INTRODUCTION

The National Coordinating Committee for Multiemployer Plans (the "NCCMP") submits this brief *amicus curiae* to urge this Court to review the holding below, which contradicts the fundamental premise upon which multiemployer plans are established and administered: that all employers' contributions are available to provide benefits to any employer's employees.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief. The NCCMP submits that a failure to review the decision

below would undercut the purpose and structure of multiemployer plans. If the proposition asserted by Appellants-Respondents and embraced by the court below—that an individual employer's contributions to a multiemployer plan may never be used for the benefit needs of another employer's employees—were accepted as true, the current multiemployer plan system would have to be completely restructured. Such a restructuring of multiemployer plans would conflict with the Congressional directive to encourage the establishment and maintenance of such plans to provide pension and welfare benefits.

The Congress, familiar with the way in which multiemployer plans operate, enacted ERISA with all of its trustee requisites, in order to ensure "the continued well-being and security of millions of employees and their dependents . . . directly affected by [employee benefit] plans." ERISA § 2(a), 29 U.S.C. § 1001(a). *See* 29 U.S.C. § 1001a. Neither in ERISA nor in Section 302 of the Labor Management Relations Act ("LMRA")[1] did Congress, expressly or otherwise, draw distinctions between multiemployer plan participants according to their allegiance to a particular employer, or artificially divide multiemployer plan contributions according to employer-employee alliances. The corpus of each multiemployer trust fund is established for all participants, without regard to whether particular employers or employees choose to discontinue their participation in the fund. As a national representative of multiemployer plan trustees, participants, and beneficiaries, the NCCMP submits that the decision below draws such employer-to-employee distinctions and, thereby, threatens the viability of all multiemployer plans.

SUMMARY OF REASONS FOR REVIEW

The NCCMP urges this Court to review the decision below, to prevent the eradication of the principles upon which multiemployer plans are founded and funded. The

[1] 29 U.S.C. § 186.

decision below is based on the flawed presumption that the LMRA requires trustees to isolate each employer's contributions to ensure that no employer's contributions will be used to benefit participants who work for other employees. Yet, the multiemployer plans "pool" their administrative and financial resources—including contributions—in order to provide benefits to all eligible participants. As the name implies, a multiemployer plan relies on the contributions of all employers to provide particular levels of benefits to all eligible participants. Were the contributions of each employer isolated, the result would be an aggregate of separate plans, *see* Treas. Reg. § 1.414 (1), that would undercut the entire structure of multiemployer plans.

Multiemployer plans are simply not designed to effectuate the type of employer-to-employee match that the decision below advocates. Thus, LMRA Section 302(c)(5) provides that contributions are to be used for the sole and exclusive purpose of benefiting a contributing employer's employees "jointly with the employees of other employers making similar payments," 29 U.S.C. § 186(c)(5). The court below gave no consideration to this express statutory directive.

When Congress did consider and enact a comprehensive, highly-detailed amendment to ERISA, the Multiemployer Pension Plan Amendments Act ("MPPAA"), Congress carefully delineated the specific instances when employers are required to pay into a multiemployer fund, and when they are entitled to receive assets out of a fund—none of which include the situation presented in the instant case.

Moreover, the legislative history of the LMRA and ERISA do not provide any support for the proposition that an employer's contributions may never be used for other than its own employees. In fact, Congress time and again considered, debated—and ultimately rejected—the type of technical provisions that would accomplish the

fund-to-fund transfer that the decision below demands. Congress clearly did not enact the LMRA, ERISA, and MPPAA, in order to mandate, *sub silentio*, that multi-employer plans should operate as aggregates of single employer plans.

REASONS FOR REVIEW

I. SECTION 302(c)(5) OF THE LABOR MANAGEMENT RELATIONS ACT

The ruling below is based on the proposition that Section 302(c)(5) makes it unlawful for funds contributed by one employer to be used for the benefit of persons other than its employees. This proposition is contrary to the plain language of Section 302(c)(5) and the legislative history of that statute. This proposition has also been rejected by the United States Court of Appeals for the Seventh Circuit in *Stinson v. Ironworkers District Council of Southern Ohio & Vicinity*, 869 F.2d 1014, 1021 (7th Cir. 1989).

In *Walsh v. Schlecht*, 429 U.S. 401 (1977), this Court upheld a collective bargaining agreement provision that obligated a general contractor to contribute to multiemployer pension and welfare funds, where the contributions were based on the hours of work performed by a subcontractor's employees, none of whom were eligible to receive benefits. In holding that the provision did not violate LMRA Section 302, this Court expressly acknowledged that the general contractor's contributions satisfied the Taft-Hartley exclusive benefit rule, where the general contractor's contributions were being used "solely for the benefit of the employees of the petitioner [general contractor] and other signatory employers." *Schlecht*, 429 U.S. at 409.

This Court's recognition that one employer's contributions to a multiemployer plan are available to provide benefits to the employees of all employers flows from the plain language of LMRA Section 302(c)(5), which states

that employer contributions must be "for the sole and exclusive benefit of the employees of such employer . . . or of such employees . . . jointly with the employees of other employers making similar payments. . . ."

The Conference Report, accompanying the LMRA, mirrors the sole and exclusive benefit language of Section 302(c)(5) that employer contributions are to be used for the employees of the employer jointly with the employees of other employers. H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 67 (1947).[2]

Section 302(c)(5) does not distinguish between contributions to provide pension benefits and contributions to provide welfare benefits; the same language is used in the same sentence in the same statutory provision for both kinds of plans. And, the federal judiciary has recognized that one employer's contributions to a multiemployer plan can be used to fund the pension benefits of another employer's employees. As the First Circuit noted in *Berkshire Hathaway v. Textile Workers Pension Fund*, 874 F.2d 53, 55 n.2 (1st Cir. 1989), "multiemployer pension plans are structured as 'pooled' funds, such that some employers, in effect, 'subsidize' the employees of other employers." It defies logic and Article III of the Constitution for the court below to have rewritten the plain language of Section 302(c)(5).

The legislative history of the Taft-Hartley Act is replete with Congressional concerns about John L. Lewis

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[2] The United States General Accounting Office last year issued a report on welfare benefits entitled, "Employee Benefits: Extent of Multiemployer Plan Retiree Health Coverage" (GAO/HRD-90-132) (July 1990), with one of its primary focuses being the construction industry, as "[o]ver half of all multiemployer health plans and 62 percent of plans with retiree coverage are in the construction industry. . . . [W]orkers in the construction industry are considered to have an employment relationship with the industry as a whole rather than with any one company. The industry is best able to meet workers' and retirees' health needs collectively, through multiemployer plans." Report at 6-7.

using employer fringe benefit contributions to create a war chest for the United Mine Workers. *See, e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess. 53 (1947); 93 Cong. Rec. 4875-76 (daily ed. May 8, 1947). To address these concerns, the Congress enacted, *inter alia*, LMRA Section 302(c)(5). Consequently, the UMWA's Retirement and Welfare Plans have been required to comply with Section 302(c)(5) for over forty years. *UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

On March 12, 1990, the Advisory Commission on United Mine Workers of America ("UMWA") Retiree Health Benefits was established to make recommendations to the Secretary of Labor on health care issues relating to these selfsame UMWA Welfare Plans. On November 5, 1990, the Commission issued its recommendation (the "Coal Commission Report") to the Secretary of Labor. Along with the Report, the Commission's Chairman (William J. Usery, Jr.) sent the Secretary an Executive Summary of the Report:

> In the last 10 years, the health care costs paid by the UMWA Health and Retirement Funds have doubled. . . . Much of the cost is attributable to "orphaned" retirees whose companies have gone out of business or ceased paying for health care benefits. More than half of the Funds' population is composed of orphan retirees. How to continue to provide health benefits to "orphans" is the essence of the problem. Signatory coal operators who are still in the coal business are willing to pay the fair cost of their retirees, but are increasingly unwilling to shoulder the burden of paying for orphans, which they view as an industry-wide problem.

Summary at iv. *See* Report at 81-88.

In other words, the Coal Commission reported to the Secretary of Labor that employers are contributing to provide benefits to other employer's employees. The decision below would equate this use of plain assets with a viola-

tion of LMRA Section 302, *i.e.*, a criminal act. Yet, the Coal Commission was not reporting about violations of Section 302. This was a report about an acknowledged and countenanced practice by multiemployer welfare plans to use employers' contributions collectively to provide benefits to employees without the restrictions that the court below engrafted on Section 302.

II. EMPLOYEE RETIREMENT INCOME SECURITY ACT

ERISA is a comprehensive statute that dictates the duties of trustees in receiving, managing, investing, distributing, and transfering plan assets solely in the interest of participants and their beneficiaries. One of the primary purposes of enacting ERISA was to provide strict fiduciary standards for the governance of pension and welfare benefit plans where only general guidelines existed under the LMRA. "The [LMRA], *Sec. 302*, provides the *fundamental guidelines* for the establishment and operation of pension funds administered jointly by an employer and a union. The Act *is not intended to establish nor does it provide* standards for . . . fiduciary conduct." S. Rep. No. 127, 93d Cong., 1st Sess. 4 (1973) (emphasis supplied).[3]

The court below concluded that an employer's contributions to a multiemployer plan cannot be used for the benefit needs of other employers' employees. It is axiomatic, however, that multiemployer plans consist of the

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[3] "Although the [LMRA] established certain structural and procedural requirements for employee benefit plans in 1947, ERISA created numerous *higher standards* for the administration of such plans." *Cutaiar v. Marshall*, 590 F.2d 523, 530 (3d Cir. 1979) (emphasis supplied). *See also NLRB v. Amax Coal Co.*, 453 U.S. 322, 332 (1981) (stating "[w]hatever may have remained implicit in Congress' view of the employee benefit trustee under the [LMRA] became explicit when Congress passed [ERISA]. ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet").

"pooled" assets of numerous employers. *See, e.g., Central States, SE & SW Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 562 (stating, as part of the factual background of the case, that each employer must make weekly contributions to the fund on behalf of each employee performing covered work, and that each plan consists of "thousands of participating employers"); *Berkshire Hathaway, Inc. v. Textile Workers Pension Fund*, 874 F.2d at 54 n.4. Similarly, the Internal Revenue Code provides that, with respect to multiemployer plans, "in determining whether the plan of an employer is for the exclusive benefit of his employees and their beneficiaries, all plan participants shall be considered to be his employees." I.R.C. § 413(a)(3).

Additionally, it cannot be disputed that some participants of multiemployer plans will receive benefits, while others will not. *See Ponce v. Construction Laborers Pension Trust Fund*, 582 F. Supp. 1310, 1314 (C.D. Cal. 1984), *aff'd*, 774 F.2d 1401 (9th Cir. 1985), *cert. denied*, 479 U.S. 890 (1986). Yet, the denial of benefits to even a single participant in a multiemployer plan has the effect of increasing the fund—*i.e.*, the pooled contributions of all employers—available to provide benefits to eligible employees of all employers. *Wilson v. Board of Trustees of the Pension Trust Fund for Operating Eng'rs*, 564 F.2d 1299, 1302 (9th Cir. 1977). In these cases, there was no attempt by the courts, the trustees, the employers, or the participants to accomplish what the court below held is mandated by law—preventing one employer's contributions to a multiemployer plan from ultimately benefiting the employees of other contributing employers—for such a result is completely contrary to the structure of multiemployer plans.

The *Berkshire* court accurately described multiemployer plans as "pooled funds," a description borne out by the fact that the contributions of some employers routinely pay for the unfunded benefits of employees whose em-

ployers have withdrawn from the multiemployer plan. *Central States*, 472 U.S. at 580, 581 n.22; *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1566 (D.C. Cir.), *cert. denied*, 469 U.S. 834 (1984); *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983). *See also J. Caflisch, Employer Withdrawal Liability Under the Multiemployer Pension Plan Amendments Act of 1980*, 9 Pens. Rep. (BNA) 182, 189 (1982) ("part of the contributions to a plan go to amortize existing unfunded benefits") (hereinafter "Caflisch").

Thus, the premise underlying the holding below cannot possibly coexist with the LMRA, ERISA, or MPPAA, much less compel the fund-to-fund transfer directed by the court below. That is, if an individual employer's contributions to a multiemployer plan could never benefit the employees of any other employer, the employee-participants of a delinquent or insolvent employer could never receive welfare benefits, for the contributions of current employers could not be used to pay the benefits of anyone other than their own employees. Yet, in the typical situation, all employers' contributions are available to provide benefits to all employers' eligible employees. *See Board of Trustees of the Watsonville Frozen Food Welfare Trust Fund v. California Cooperative Creamery*, 877 F.2d 1415, 1420 (9th Cir. 1989).[4] Nor could that delinquent or insolvent employer's vested employee-participants ever receive pension benefits, when, in fact, ERISA requires a pension plan[5] to award ser-

[4] In *California Cooperative Creamery*, the court faced the unusual situation in which a welfare plan had established a form of withdrawal liability to prevent withdrawing employers from leaving the remaining contributing employers to fund the benefits of the withdrawn employer's employees. 877 F.2d at 1420.

[5] This Court has been careful to state that, "[a]lthough most of ERISA's legislative history focused on pension plans, Congress also studied the operation of other employee benefit plans and developed a similar regulatory framework respecting these other plans. For

vice credit without regard to whether an employer has made its required contributions. *Central States*, 472 U.S. at 567 n.7, 579 n.20.

Similarly, in a case recently decided by the United States Court of Appeals for the Ninth Circuit, *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. Sept. 10, 1991), the court rejected the approach of the Second Circuit in the instant case, *id.*, slip op. at 12575; instead, the *Phillips* court viewed the participants as a pool, without regard to the particular employer-employee relationships. The *Phillips* court accepted the fact that, although contributions were made on behalf of all persons working in covered employment, only a fraction of those participants would ever be eligible for benefits. *Phillips*, slip op. at 12574-76. It is axiomatic that any one employer's contributions to a multiemployer plan will be pooled for the theoretical use of all eligible participants, only some of whom will actually receive benefits, for that is the nature and structure of multiemployer plans.[6]

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example, ERISA's rules concerning reporting, disclosure, and fiduciary responsibility apply to all employee benefit plans." *Central States*, 472 U.S. at 569 n.9. Thus, there is no basis in the Act or its legislative history for distinguishing between welfare and pension plans where the issue is one that concerns the basic operation of multiemployer plans, such as the issue in this case.

[6] This Court has emphasized, in a number of decisions, the collective responsibilities of the unions and employers that sponsor multiemployer plans. In *Central States*, the Court decided the issue of whether an employer participating in a multiemployer benefit plan governed by ERISA must allow the plan to conduct an audit involving the records of *all* employees, including records of employees who the employer denied were participants in the plan. In the course of its analysis, the Court reaffirmed its decision in *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), emphasizing the independent nature of multiemployer benefit plans, and the trustees' duty to the needs of the plan as a whole. The Court stated, "as we recognized in *Schneider*, a union's arrangements with a particlular employer might compromise *the broader*

III. THE MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT

The Multiemployer Pension Plan Amendments Act further undercuts the decision below; for, to assert that trustees must transfer plan assets from one fund to another so that the specific contributions made on behalf of specific employees will inure to their benefit only, is to stand both the theory and practice of withdrawal liability on its head. A comprehensive, detailed amendment to ERISA, MPPAA compels an employer that withdraws from a pension plan to pay a share of the unfunded vested benefits of all eligible employees who participate in the plan.

Particularly revealing for purposes of the instant case is the theory under which Congress chose to allocate to a withdrawing employer a portion of the liability for all employee-participants' benefits. When an employer withdraws from a multiemployer plan in a complete withdrawal,[7] the employer is liable to the plan in the amount determined to be its withdrawal liability, or in the words of the statute, "the withdrawal liability of an employer to a *plan* is the amount determined under Section 4211 [of ERISA] to be the allocable amount of unfunded vested benefits." ERISA § 4201, 29 U.S.C. § 1381 (emphasis supplied). To reiterate, the unfunded vested ben-

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interests of the plan as a whole: 'These are multiemployer trust funds. Each of the participating unions and employers has an interest in the prompt collection of the proper contribution from each employer. Any diminution of the fund caused by the arbitration requirements of a particular employer's collective bargaining agreement would have an adverse effect on the other participants.'" *Central States*, 472 U.S. at 576 (citing *Schneider*, 466 U.S. at 373) (emphasis supplied).

[7] With certain exceptions not relevant here, a complete withdrawal occurs under ERISA "when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." ERISA § 4203(a), 29 U.S.C. § 1383(a).

efits are the unfunded vested benefits for the *plan*. That is, if the unfunded vested benefits for a plan are the result of the delinquent contributions of fifty employers other than the withdrawing employer, the withdrawing employer is still liable for a proportionate share of the unfunded vested benefits for that plan.[8] It does not necessarily matter whether the withdrawing employer has fully funded the vested benefits for the individual participants that it employs; it matters only that there are unfunded vested benefits for the plan as a whole. *Caflisch* at 188-89.

Aside from the theoretical underpinnings of withdrawal liability, there is ample evidence in MPPAA that Congress did not intend each employer's contributions to be used only for the benefit of its own employees. Congress included in MPPAA four methods of calculating withdrawal liability, none of which precisely determine the allocable unfunded vested benefits for an individual employer in relation solely to its own employees. Section 4211 of ERISA provides that the unfunded vested benefits allocable to an employer that withdraws from a plan be determined under one of four methods, namely, the "presumptive," "modified presumptive," "rolling five," or

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[8] During the deliberations over MPPAA, the Senate Committee on Labor and Human Resources reported that:

> [Delinquent contributions] detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, *uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.*

Staff of Senate Committee on Labor and Human Resources, S.1076: The Multiemployer Pension Plan Amendments Act of 1980, 96th Cong., 2d Sess. at 233-34 (unnumbered Committee print, April 1980).

"direct attribution" methods. ERISA §§ 4211(b), 4211(c), 29 U.S.C. §§ 1391(b), 1391(c); 29 C.F.R. § 2642.1 (1988). Each of the methods for calculating withdrawal liability under ERISA Section 4211 does so differently. "[T]he *method adopted* may have a *tremendous impact* on the potential withdrawal liability of employers who contribute to the plan." *Caflisch* at 189 (emphasis supplied).

Congress expressly provided for these variations in the determination of an employer's share of the unfunded vested benefits for a plan; Congress did not seek to make each withdrawing employer liable solely for the unfunded vested benefits of its own employees, but for a share of the unfunded vested benefits of the plan as a whole. Thus, each withdrawing employer pays for the unfunded vested benefits of employee-participants not its own. Likewise, when a withdrawing employer does not contribute its share of the unfunded vested benefits of the plan, or does not contribute a share commensurate with the vested benefits earned by its employee-participants, the employers that remain in the plan cover the cost of those benefits, either through increased contributions, or increased withdrawal liability. *Berkshire*, 874 F.2d at 55 n.2; *Stewart*, 730 F.2d at 1554 n.4.

The decision below is also inconsistent with the fact that, of the four statutory methods of calculation, *only* the direct attribution method "attempts to relate a withdrawing employer's liability to the unfunded vested benefits that are directly related to the employer." *Caflisch* at 190. Yet, the "direct attribution" of an employer's withdrawal liability has been called "unworkable" for most multiemployer plans.

> Many employers may regard the third alternative method, direct attribution, as the most equitable. . . . In practice, however, this approach probably will prove to be unworkable for most plans. In order to be perceived as equitable, direct attribution probably

> would be extremely complex and would require extensive data that most plans do not have. Even if adequate data is available, it may be difficult to obtain agreement on the proper method to use in attributing unfunded vested benefits to employee's [sic] service with particular employees. Finally, it may be argued that *since direct attribution attempts to determine liability as if a multiemployer plan were an aggregate of single employer plans, direct attribution is fundamentally inconsistent with the basic nature of multiemployer plans.*

Caflisch at 190 (emphasis supplied). What the decision below demands, in effect, is that multiemployer plans be treated as aggregates of single employer plans. But this, Congress has chosen not to do.

If the LMRA were really to dictate that no one employer's payments into a multiemployer plan may be used for the benefit of other employers' employees, the LMRA would operate so as to make illegal the imposition of withdrawal liability under ERISA. Yet, ERISA and MPPAA were enacted many years after—not before—the LMRA, and the Congress considered, in depth, the LMRA during the deliberations that led to the drafting and enactment of ERISA. *E.g.*, H. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* III *Legislative History of the Employee Retirement Income Security Act of 1974* 4639, 4641 (1976) (hereinafter "*Legis. Hist.*").

IV. PORTABILITY

Finally, the legislative history of ERISA reveals that Congress considered, at length and in detail, the enactment of a provision that would provide participants with the ability, in some manner, to carry with them their benefits when they left one employer, voluntarily or otherwise, for another.

In the Report of the Committee on Finance for the Senate that accompanied S. 1179, a precursor to ERISA

entitled, "Comprehensive Private Pension Security Act of 1973," the Committee emphasized the policy reasons for trying to find a way to establish "portable" pension rights: "The mobility of labor in the United States has been steadily increasing. . . . On retirement, these employees will have to deal separately with each of their employers . . . and since each employer may have a different type of plan, working out retirement programs may be difficult for these employees." S. Rep. No. 383, 93d Cong., 1st Sess. (1973), *reprinted in* I *Legis. Hist.* 1063, 1140. For these reasons, Congress analyzed the feasibility and desirability of mandating portable benefits for individual employees, and developed a number of proposals for implementing portable pension rights.

The legislative history of ERISA makes it clear that Congress fully considered the problems attendant with the development of portable rights. Congress discussed a central portability fund, but only in voluntary terms, because of the belief that such a central fund was not "workable" on a mandatory basis. The Finance Committee Report on S. 1179 explained one of the difficulties of making the central fund mandatory, stating that "it often would be difficult to place a specific value on the vested rights of an employee in a fixed benefit pension plan in view of the fact that the formulas under which benefits are computed, as well as the actuarial assumptions used, vary widely." S. Rep. No. 383, 93d Cong., 1st Sess. (1973), *reprinted in* I *Legis. Hist.* 1098-99.

Congress had an additional concern: the effect on the funding of a pension plan when employees sought to transfer their individual benefits from the funds. The Report stated that "the compulsory transfer of funds representing an employee's vested rights from an employer's pension plan to the central portability fund would raise further difficulties where the pension plan is not fully funded since *the transfer of funds under such circumstances might be considered detrimental to the re-*

maining covered employees in the pension plan." *Id.* at 1100 (emphasis supplied).

When Congress considered enacting a "portability" provision, it specifically considered those situations where the contributions made to pension funds on behalf of employees would never inure to their benefit. Not only did Congress consider the equity that would result from portable rights for employees who had labored many years to attain pension benefits, but it considered the administrative feasibility of such rights—and it decided, for a variety of reasons, that providing such rights was not feasible.

During the debate on early versions of ERISA, Senator Dole stated, "I do not know whether portability adds much from the employee's point of view, and its administration certainly has many negative aspects for employers and in the creation of another bureaucracy to oversee it. In any event it should be noted that portability [at this stage] is voluntary and there is no intention of making it mandatory." Sept. 18, 1973 Floor Debate on S. 4, *reprinted in* II *Legis. Hist.* at 1876. Similar views were presented in the House. Representative Esch encouraged the establishment of portable rights, but stated that "it should be recognized that any attempt to make vested funds portable from one plan to another is impracticable and administratively unfeasible." H. Rep. No. 533, 93d Cong., 1st Sess. 1973, *reprinted in* II *Legis. Hist.* 2348, 2392.

It is significant that Congress ultimately rejected the notion of portable pension rights. The fact that Congress considered what rights, if any, an employee had to accrued vested benefits when the employee left one employer for another demonstrates that Congress was fully cognizant of the situations in which employees would not gain the benefit from contributions made on their behalf. Congress addressed the notion of "matching" employees to

their accrued benefits. Although Congress rejected "matching," the decision below embraced it.

CONCLUSION

Based on the foregoing, we respectfully urge the Court to issue a Writ of Certiorari.

Respectfully submitted,

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No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONERS

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONERS

Central States, Southeast and Southwest Areas Pension Fund moves the Court for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari of petitioners Local 144 Nursing Home Pension Fund, et al. Central States urges that the United States Court of Appeals for the Second Circuit be reversed. The reasons for this motion are as follows:

1. Central States Pension Fund is the largest multi-employer defined benefit pension plan in the country.

The Pension Fund covers approximately 400,000 active participants and retirees.

2. Central States is governed by the Employee Retirement Income Security Act of 1974, as amended. Sections 4231 through 4235 of ERISA provides the exclusive means for a pension plan like Central States to transfer assets and liabilities to another plan.

3. The Central States pension plan and trust agreement bars Central States from transferring liabilities to another plan; hence, pursuant to Section 4234 of ERISA, 29 U.S.C. § 1414, Central States is prohibited from transferring assets to another plan.

4. If the decision of the court of appeals were applied to Central States, it would be obligated to transfer assets to a new plan at the discretion of an employer that withdraws from Central States. Such a transfer would violate the plan and ERISA.

5. Transfers of assets, especially when not accompanied by transfers of vested liabilities, are actuarially unsound and could lead to the insolvency or termination of Central States and hundreds of similarly situated multiemployer pension plans.

6. Petitioner consents to the filing of this brief. Respondent refuses to consent. The Petition was served on Respondent on October 15, 1991.

Respectfully submitted,

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QUESTION PRESENTED

The United States Court of Appeals for the Second Circuit ruled in the decision below that it was a structural defect under § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), for a multiemployer pension plan and a multiemployer health and welfare plan that were established pursuant to collective bargaining to refuse to transfer assets attributable to contributions made on behalf of an employer's employees when the employer left the old plans and joined new plans. The court held that a portion of the assets of the old plans must be transferred involuntarily to the new plans upon demand of the employer.

The question presented is—

Whether § 302(c)(5) of the LMRA overrides the provisions of ERISA, 29 U.S.C. § 1411-1415, which purport to be the exclusive rules for transfers of assets and liabilities between multiemployer defined benefit pension plans, so that an employer that withdraws from a multiemployer defined benefit pension plan and creates a new plan is entitled under § 302(c)(5) to have assets of the old plan attributable to contributions made by the employer on behalf of its employees transferred to the new plan.

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BRIEF OF AMICUS CURIAE CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN SUPPORT OF PETITIONERS

INTRODUCTION

Central States, Southeast and Southwest Areas Pension Fund ("Central States" or "Pension Fund") is a multi-employer defined benefit pension trust fund established in 1955 by affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations

Act (LMRA). Central States is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). Central States is administered for the exclusive benefit of the participants to whom the Trustees owe an undivided duty of loyalty. The purpose of the Pension Fund is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the Central States pension plan (the "Plan").

Under the Trust Agreement participating employers contribute to Central States pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. Under the Pension Fund employees earn credit (accrued benefits) for covered work periods and after earning 10 years of credit, become vested in the benefits. In order for an employer and its union employees to participate in the Fund, their collective bargaining agreement, including the contribution rates, must conform to the Trust Agreement and the Plan. If an employer's obligation to contribute ceases, then coverage ceases for employees of the employer. Neither employees nor retirees of the employer, however, lose their vested benefits under the Pension Fund.

INTERESTS OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

The United States Court of Appeals for the Second Circuit posed the following question in the case below:

> [W]hether, when an employer leaves pension and welfare trust funds in favor of another set of trust funds, § 302(c)(5) of the Labor Management Relations Act ("LMRA") requires a reallocation of monies paid to the former funds on behalf of its employees, so that the monies are used "for the sole and exclusive benefit of the employees of such employer" as those terms are used in § 302(c)(5).

The court answered yes, that a reallocation of assets from the old trust funds to the new trust funds is mandatory in those circumstances. If the court of appeals is correct, then the financial integrity and solvency of all such trust funds is placed in immediate jeopardy. Forty years of settled expectations and reliance under the LMRA will have been undone. It would be irrational for employers *not* to take advantage of this change of law to seize the assets to their more direct benefit at the cost of undoing these trust funds.

It would be difficult to overstate the impact of the decision below on multiemployer pension plans. These plans are pooled trusts pursuant to the requirements of the LMRA under which all the assets of the plan are available to satisfy any benefit under the plan. The court of appeals has in effect, however, empowered employers who contribute to such plans with the right to divert assets attributable to contributions on behalf of their employees to another plan without regard to the liabilities left behind in the old plan.[1] This may not be a power that every employer will wish to use—at least initially. Only those employers that stand to gain economically will have the incentive to leave the old plan. This is a zero-sum game, however. If the employers who leave achieve an economic gain, then the old plan and the employers that remain behind are the losers. With each withdrawal the growing deficit in the old plan creates additional incentives for more withdrawals, escalating until plan failure and termination occurs. Indeed it may even become strategically necessary for a plan to voluntarily terminate

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[1] Indeed, the court of appeals seems to have disregarded entirely that the trust funds are independent entities with rights and obligations that are separate from the collective bargaining parties. The old pension fund must still pay the vested benefits of even the transferred employees from the now diminished assets. Even if the new fund purported to assume vested liabilities (it did not), there is no mechanism by which the employees can be required to forfeit their vested rights in the old plan.

to gain the statutory right to reallocate its unfunded liabilities among previously withdrawn employers. In sum, if these plans cease to be pooled trusts for all purposes (the effect of the decision below), their rapid decline and ultimate demise is assured.

This is not an idle or abstract concern of Central States. The Central States Pension Fund consists of 250,000 active participants and 150,000 retirees. Since September 26, 1980, Central States has lost 150,000 participants as thousands of employers have ceased contributing to the Pension Fund. Of these, approximately 1250 employers have been assessed withdrawal liability pursuant to the 1980 amendments to ERISA, 29 U.S.C. § 1381 et seq. Withdrawal liability is a withdrawing employer's pro rata share of the plan's unfunded vested benefits.[2] To date Central States has collected in excess of $319 million in withdrawal liability.

If employers who withdraw from Central States can, simply by creating a new plan of their own, demand and receive a share of Central States assets, they have, in effect, reduced the amount of or eliminated their withdrawal liability. In creating withdrawal liability Congress sought in part to discourage withdrawals. If an employer can reduce the cost of withdrawal, it will make economic sense for more employers to withdraw.[3]

In addition, as noted above, Central States (and most multiemployer pension plans) have some degree of unfunded vested benefits. When assets are taken from the plan, the deficit grows. Such losses must be borne by

[2] Central States presently has $1.7 billion in unfunded vested benefits—the difference between $12.2 billion in vested benefits and $10.5 billion in current assets.

[3] By leaving higher cost vested benefits in the old plan for other employers to fund and starting a new plan with lower benefits and smaller costs plus assets from the old plan, an employer could gain a significant competitive advantage.

contributing employers and their employees. In some cases contributions may have to be raised to meet ERISA's minimum funding standards, and increased contributions reduces the employer's resources available for wages and other benefits. Even if contributions are not raised, it will take longer to fund the existing benefits, thus reducing resources that might have been used to raise benefits (for example, for cost of living increases).

Ironically, as each employer takes assets from the plan for its own new plan, it would raise the level of unfunded vested benefits from which the withdrawal liability of future withdrawn employers will be calculated. Delaying a withdrawal would be progressively more costly for an employer—a further incentive for early withdrawal. Even employers that might not otherwise consider withdrawing, might be forced to do so by rising plan costs. Since no employer will want to be the last one left in the plan to carry the burden of all residual plan liabilities alone, there is potential for a stampede; termination by mass withdrawal of all remaining employers may become the only rational alternative.

In short, one of Congress' principal purposes in the 1980 amendments to ERISA—encouraging plan continuation—would be undermined due to the destabilizing effect of forced asset transfers. If this Court does not grant the writ of certiorari and, ultimately, reverse the court of appeals, the end for multiemployer plans cannot be far behind.[4]

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[4] Of course it is possible (even probable) that the other courts of appeals will disregard the Second Circuit decision. Given the importance Congress attached to stabilizing these plans, however, this Court should not wait for the case law to sort itself out, thereby jeopardizing, in the interim, the benefits of innumerable multiemployer plan participants.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Second Circuit ruled in the decision below that it was a structural defect under § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), for a multiemployer pension plan and a multiemployer health and welfare plan that were established pursuant to collective bargaining to refuse to transfer assets attributable to contributions made on behalf of an employer's employees when the employer left the old plans and joined new plans. The court held that a portion of the assets of the old plans must be transferred involuntarily to the new plans upon demand of the employer.

In so ruling the court of appeals disregarded that the Employee Retirement Income Security Act of 1974, as amended, provides the exclusive means for transferring assets and liabilities between multiemployer pension plans. See 29 U.S.C. § 1411-1415. Plans like Central States are not required by ERISA to transfer assets as the court of appeals would require. If allowed to stand, the court of appeals decision would allow employers to select adversely against the actuarial interests of Central States and other such plans. Because it is generally in the pecuniary interests of employers to make such choices, it would lead to the decline and almost certain failure of such plans in contravention of the purposes of ERISA. This Court should grant the writ of certiorari in order to reconcile this court-created conflict between the statutes.

REASONS FOR GRANTING THE WRIT

By enacting § 302(c)(5) of the LMRA Congress permitted, *inter alia*, the creation of multiemployer benefit trust funds.[5] It was not, however, until the enactment of

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[5] The following discussion will concentrate on the effect of the court of appeals' decision on multiemployer pension plans. Pension plans present special concerns because they provide vested benefits

ERISA in 1974 that Congress sought to comprehensively regulate these and other funds. The 1980 amendments to ERISA sought further to foster multiemployer pension plan continuation by correcting certain destabilizing influences that threatened a flood of plan terminations. Now by the decision below the Court of Appeals for the Second Circuit has disregarded all of ERISA's regulation. As if it were operating in a regulatory vacuum, the court has returned to the earlier LMRA to put a gloss on its language that overrides the subsequent ERISA regulation.

Specifically, the LMRA does not provide any rules regarding the transfer of assets and liabilities among plans, but ERISA does. The LMRA does not provide any rules for an employee's vesting in any assets or benefits under the plan, but ERISA does. Further the Internal Revenue Code and regulations, not the LMRA, provide when termination of a group of participants constitutes a partial termination of the plan requiring that the participants become vested in their benefits to the extent they are funded. Finally, only ERISA provides how assets are allocated to benefits under a plan. Yet the court of appeals, seeking to correct a perceived "structural defect," has used the LMRA to circumvent this reticulated regulatory scheme and provide a remedy directly at odds with it.

It is axiomatic that in any defined benefit plan not every participant will receive a benefit under the plan. Only participants who meet the service and other requirements for benefits will receive them. Amounts contributed on behalf of those who do not earn benefits, fund, in part, the benefits of those who do. This translates into a universally accepted actuarial funding assumptions under which employers pay less in contributions per participant. If the court of appeals is right, then the funding assump-

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under ERISA standards that are not affected by the decision below (except to the extent the decision deprives the plan of assets to pay the vested benefits).

tions of all multiemployer defined benefit plans have been wrong since their inception.

Another core premise upon which multiemployer plans are founded is that in certain industries an employee's work relationship is with the industry as a whole as much as with any particular employer. If an employee's relationship with any one employer is brief, then the employee might never earn a pension from the employer's plan. As the employee moved from one employer to another, benefits in the first employer's plan (if there even were a plan for that employer) would be forfeited and the employee would have to start over in the new employer's plan (if there were one), perhaps never earning a vested benefit in any plan, even though spending much of a working life as a participant in these plans.

Multiemployer plans were an attempt to remedy this problem by permitting the industry through collective bargaining between unions and groups of employers to set up mulitemployer plans. All employers would contribute to the plan, and employees would retain all benefits under the plan earned with any contributing employer. These plans are, and were intended to be, pooled trusts. That is to say that while employee participants earn rights to benefit under the plan, they do not acquire rights to any particular assets of the plan. The assets must be used "for the sole and exclusive benefit of the employees of [the contributing] employer . . . jointly with the employees of other [contributing] employers . . . ."[6] Section 302(c)(5). Accordingly the assets from all sources are available to satisfy any benefit under the plan regardless of source.

This kind of plan is a "defined benefit plan," which is to say that the participant earns rights to specified bene-

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[6] Inexplicably the court below ignored the parenthetical language in the statutory provision, which clarifies that contributions are not segregated by employer but rather are general assets available to pay benefits of any contributing employer's employees.

fits, not just the assets of the plan. This is significant because there may not be sufficient assets, at any given time, to cover all promised benefits, nonetheless the participant knows the benefit she or he will receive without regard to the day to day fluctuations in asset values.

Not all plans are this type. Some may be "defined contribution plans." In this kind of plan the participant is provided an account into which contributions are made on his or her behalf. Upon distribution (at retirement or otherwise) the participant receives the assets in the account. There is no guaranteed benefit level. If, due to a down market or bad investments, the account loses value, the participant will receive a smaller benefit than otherwise. Another type of "plan" might contain an account for each employer. This would actually constitute an aggregate of single-employer plans (most likely defined benefit plans) and would not be a multiemployer plan like Central States.

What the court of appeals has created is a hybrid. The Local 144 pension plan is a defined benefit multiemployer plan, but the court afforded withdrawing employers certain rights to assets as if the plan were an aggregate of single-employer plans.[7] What distinguishes the Local 144 plan from a defined contribution plan or an aggregate of single-employer plans, however, is that vested benefits of the employees who left the plan remain behind as liabilities of the old plan even when assets are transferred and certain liabilities are assumed by the new plan. Leaving vested benefits in the old plan while transferring assets to the new plan produces a mischief that threatens all multiemployer plans.[8]

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[7] Taken to its logical limit the court of appeals decision would also seem to mandate treating these plans as defined contribution (individual account) plans even though the court expressly disclaims an intent to reach that far.

[8] Even asset transfers accompanied by vested liability transfers are troublesome. Congress strictly limited the eligibility for such

The following example illustrates the dangers of this kind of asset transfer to a plan like Central States:

If we assume that the old plan, before the transfer, had 10 units of vested benefits, 10 units of non-vested benefits, and 8 units of assets, then it would have 2 units of unfunded vested benefits.

OLD PLAN: BEFORE TRANSFER

Vested Liabilities	= 10 Units
Non-Vested Liabilities	= 10 Units
Assets	= 8 Units
Unfunded Vested Benefits	= 2 Units
Ratio of Assets to Vested Liabilities	= 80%

Assume further that employer and employee characteristics are very uniform and that half the employers (and half the employees) transfer to the new plan, taking half the assets. The old plan would retain all 10 units of vested benefits but only 4 units of assets for an increase in unfunded vested benefits to 6 units. The new plan would acquire 4 units of assets but no vested benefits and 5 units of non-vested benefits would be recognized by the new plan and lost by the old plan.

OLD PLAN: AFTER TRANSFER

Vested Liabilities	= 10 Units
Non-Vested Liabilities	= 5 Units
Assets	= 4 Units
Unfunded Vested Benefits	= 6 Units
Ratio of Assets to Vested Liabilities	= 40%

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transfers in 29 U.S.C. §§ 1411-1415. Mandatory transfers take place only under § 1415. Voluntary transfers of assets are permitted only where liabilities are transferred. § 1414. Central States, like many such plans, bars liability (hence asset) transfers by the terms of the plan.

NEW PLAN: AFTER TRANSFER

Vested Liabilities	= 0 Units
Non-Vested Liabilities	= 5 Units
Assets	= 4 Units
Unfunded Vested Benefits	= 0 Units
Funding Surplus	= 4 Units

The ratio of assets to vested benefits in the old plan drops from 80% to 40%. Since only vested benefits get paid, the old plan is more poorly funded while the new plan has no vested liabilities and thus has a 4 unit surplus in assets. Over time the new plan may acquire vested liabilities and additional assets due to new contributions. But the new plan's assets provide a comfortable cushion—its ratio of assets to vested liabilities will remain greater than 100% for an indeterminate length of time—which should translate into lower contribution obligations of employers.[9]

The impact of this kind of transfer may be amplified in another way not shown by the diagrams. If the workforce is not uniform within each employer, the employees transferred to the new plan may have favorable actuarial attributes from a funding standpoint that would enhance their value to the new plan and the loss to the old plan. This would be the case if the transferred employees were younger than those left in the old plan. Younger employees may not vest thus creating benefit forfeitures that allow assets contributed on their behalf to be applied to other vested benefits thus reducing the need for current contributions. And even if some of the younger employees do vest, there is generally more time available before their retirement to fund their benefits—a factor that also reduces the need for current contributions. Even the em-

[9] This description is generally valid for any transfer of assets to the new plan that is not accompanied by a transfer of vested benefit liabilities. The ratios would depend on the actual characteristics of the employers and employees and how much is actually transferred, but the net affect will always be a loss to the old plan and a surplus to the new plan.

ployer with an older (actuarially unfavorable) workforce may over time see a shift, as older employees retire, to a younger (actuarially favorable) workforce. By transferring the current (younger) employees to a new plan, the employer can avoid the retiree costs as well. See *Central Hardware Co. v. Central States, Southeast and Southwest Areas Pension Fund*, 770 F.2d 106, 110-111 (8th Cir. 1985), *cert. denied*, 475 U.S. 1108 (1986). In the old plan the burden of funding vested benefits, including the retirees of the now-departed employer, will be corresponding higher for the contributing employers left behind.

This is a type of adverse actuarial selection that is all too common in multiemployer plans. Employers often seek to split a bargaining unit to leave older employees in a plan where they will draw their vested pension benefit while younger employees are placed in the employer's separate plan (or no plan) at great savings to the employer. Of course plans like Central States forbid this practice. See *Central States v. Gerber Truck Service*, 870 F.2d 1148 (7th Cir. 1989).

> Our pattern must be common: An employer wants some of its employees to have pension and health benefits, and others not. Some may be only a few years away from vesting. Pension and welfare trusts, like insurers generally, want to avoid 'adverse selection', the dropout of persons safer or younger than the pool's average. Funds insist that members of a group be in or out as a bloc: the fund cannot cover the old and infirm at a rate computed from group averages while receiving nothing on behalf of younger employees. Employers often strongly wish it were otherwise. Local unions may not care about selective inclusion in pension plans (since the costs are borne by employers in other parts of the country), and from their perspective having some workers covered is better than having none.

Id. at 1151-52. But under the court of appeals decision employers now have a means of direct attack on Central States to achieve a similarly damaging actuarial result.

The court of appeals apparently realized that it was treading dangerous ground. Thus it stated that its decision did not require asset transfers for individual employees who leave a plan, but only for employees of an employer who leaves the plan. Further it stated that the asset transfer would apply only to the extent of liabilities undertaken by the new plan. The court failed, however, to provide a supporting rationale for these limitations or principles upon which to derive one; thus leaving us only with the court's *ipse dixit*. We have already shown that the assumed liabilities were non-vested hence provide no relief to the old plan. But even if the new plan assumed vested benefit liabilities, that would not relieve the old plan of its obligations to pay the vested benefits, and participants would retain their rights against the old plan. ERISA provides the exclusive means of transferring such benefits. See 29 U.S.C. §§ 1411 through 1415.[10]

Further if one is allowed to ignore the pooled trust nature of a multiemployer plan and force a transfer of contributions on behalf of all of an employer's employees, why would this not apply equally to a transfer of only a portion of the employees? This of course could produce a split bargaining unit, presumably overriding any plan provisions (such as Central States has) that would prohibit it. Finally, why should not a single employee who, for example, quits work, be able to set up an individual retirement account and demand a transfer of assets to it? While the court of appeals states that its decision

[10] If the court had limited its decision so as to relate the asset transfer to the new plan's assumption of vested benefit liabilities, it still would be wrong, but at least the decision would more closely accord with ERISA. In actuality the decision turns the ERISA rules on their head, increasing the old plan's liabilities while providing a windfall to the new plan—the opposite of what ERISA's transfer rules allow.

does not reach that far, it is not an illogical reach if the "exclusive use" language mandates any transfer at all.[11]

In short the court of appeals decision invites chaos. In the flood of litigation that we can assume will follow the court of appeals decision, if it is not reversed, these limits will no doubt be tested and principles will be sought upon which to base "reasonable" asset transfers. It is all unnecessary, however, because the court of appeals was wrong. Had it examined ERISA, the court would have seen that Congress had expressly provided what plans and employers may and may not do to transfer assets and liabilities among plans. This oversight threatens, by undercutting ERISA's careful regulation, to bring an end to multiemployer defined benefits pension plans.

CONCLUSION

The decision of the court of appeals tramples the express language of and important national policies underlying ERISA, and jeopardizes the continued existence of multiemployer trust funds like Central States. This Court should grant the writ of certiorari. The court of appeals should be reversed.

Respectfully submitted,

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[11] If pension portability were already mandated by the LMRA, then ERISA need not have grappled with it as it did in Title III of ERISA. In fact neither Congress, nor anyone else believed portability was already upon us until the court of appeals surprising discovery.

(7)

No. 91-610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,

Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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I

Preliminary Statement

Respondents[1] respectfully submit this brief in opposition to the brief of the United States as *amicus curiae*, to urge the Court to deny the petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit. The issue in this case does not present an important issue of unsettled law that should be decided by the Court.

On the last page of his brief the Solicitor General asserts two reasons the Court should review this case. First, the Solicitor General claims, without reference to any supporting evidence, that the issue decided by the Second Circuit is of "manifest importance." Second, the Solicitor General asserts that there is a "square conflict" in the courts of appeals on this issue. As demonstrated herein, these assertions are not correct.

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[1] Respondents include the management trustees of the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds (collectively, the "Southern Funds"), the employers and management companies that are members of the Southern New York Residential Health Care Facilities Association, Inc. (the "Southern Employers"), and individual employees of the Southern Employers ("Southern Employees").

II

THE SECOND CIRCUIT DID NOT ESTABLISH A *PER SE* RULE OF "MANIFEST IMPORTANCE"

The Solicitor General asserts that this case presents a question of "manifest importance" because the Second Circuit has created a "per se" rule requiring trustees of multiemployer Taft-Hartley plans to transfer reserves any time employees withdraw from those plans. *See* Brief of United States at p.6. The Second Circuit did not establish a "per se" rule that applies in every situation. Even the Solicitor General acknowledges that the Second Circuit "recognized the well-established rule that trustees are not required to transfer funds to a new plan whenever employees leave a plan" in *O'Hare v. General Marine Transport Corp.*, 740 F.2d 160, 173 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985). Brief of United States at p.10. The Second Circuit's holding is limited to the unique facts of the instant case in which nearly 2,000 employees transferred benefit coverage from one set of multiemployer benefit plans to another set of multiemployer benefit plans. At the time of the transfer, the first set of funds possessed excess reserves that were derived in part from contributions made on behalf of the Southern Employees. Pet. App. at 10a.

Moreover, the issue of mandating the transfer of excess reserves among multiemployer plans when a significant group of employees transfer to coverage under new multiemployer plans rarely arises. The Solicitor General identifies only two cases, and petitioners cite only one other case, which they claim address the same issues present in the instant case. *See Sheet Metal Workers' Local 28 of New Jersey Welfare Fund, et al. v. Gallagher, et al.*, 140 L.R.R.M. (BNA) 2001 (3d Cir. April 3, 1992); *Trapani v. Consolidated Edison Employees' Mutual Aid Society, Inc.*, 891 F.2d 48 (2d Cir. 1989); *Stinson v. Ironworkers Dist. Council of Southern Ohio and Vicinity Benefit Trust*, 869 F.2d 1014 (7th Cir. 1989). The limited effect of the Second's Circuit decision does not present an issue of "manifest importance" justifying review by the Court.

III

NO OTHER CIRCUIT COURT IS IN CONFLICT WITH THE SECOND CIRCUIT

The Solicitor General also asserts that the Court should review the decision of the Second Circuit because it is in "square conflict" with the decision of the Seventh Circuit in *Stinson*, 869 F.2d 1014 (7th Cir. 1989). The Seventh Circuit specifically distinguished the Second Circuit's decision in *Local 50, Bakery & Confectionary Workers Union v. Local 3, Bakery & Confectionary Workers Union*, 733 F.2d 229 (2d Cir. 1984) ("*Local 50*"), the case on which the instant case is based. The Seventh Circuit noted instead that it was following the reasoning in the Second Circuit's decision in *O'Hare*. 869 F.2d at 1021.

The courts in *Local 50*, *Stinson*, *O'Hare*, and in the instant case, recognize that section 302(c)(5) of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 186(c)(5) may require the transfer of reserves among multiemployer benefit plans under certain circumstances to remedy structural defects in the operations of Taft-Hartley trust funds.[2] In *dicta*, the *Stinson* court noted that, "at least in this case," it would not order a transfer of reserves under any circumstances. 869 F.2d at 1021. The Seventh Circuit focused on facts particular to that case: the nature of the construction industry; the movement of employees among different employers; and the predictable surges and declines in employment in the industry. Id. at 1021-1022. None of these facts are present in the instant case.

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[2] The Third Circuit also has endorsed the principle that courts may require a transfer of funds between Taft-Hartley trust funds under section 302(c)(5) under certain circumstances if necessary to remedy a structural defect in the operations of the trust funds, citing to the instant case, O'Hare and the district court opinion in *Local 50*, 561 F. Supp. 205 (E.D.N.Y. 1983), *aff'd*, 733 F.2d 229 (2d Cir. 1984). *See Sheet Metal Workers' Local 28*, 140 L.R.R.M. 2001 (BNA) (3d Cir. April 3, 1992).

The Solicitor General implies that the decision of the Court of Appeals is in conflict with *Stinson* because the Second Circuit, unlike the Seventh Circuit, permits "employees a right to trace and claim the contributions of their particular employers." Brief for United States at p.7. The Second Circuit expressly rejected this conclusion, noting that "the benefits of individual employees need not be tied to their individual contributions." Pet. App. at 10a.

Conclusion

The question of whether section 302(c)(5) of the LMRA requires a transfer of excess reserves among multiemployer benefit plans in situations in which a significant number of employee-participants transfer from one set of multiemployer trust funds to another set of multiemployer trust funds is not an important question of unsettled law that should be decided by the Court. Based on the foregoing reasons, the Court should deny the petition for writ of *certiorari* to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 10, 1991
CERTIORARI GRANTED JUNE 22, 1992

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The following opinions, decisions, judgments, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
Aug. 7, 1985	—Plaintiffs' original complaint in U.S. District Court for the Southern District of New York filed.
Aug. 28, 1985	—Plaintiffs' first amended complaint filed.
Jan. 7, 1986	—Order entered permitting Plaintiffs to file second amend complaint.
Jan. 24, 1986	—Defendants' answer to Plaintiffs' second amended complaint filed.
Nov. 25, 1986	—Plaintiffs' third amended complaint filed.
Dec. 22, 1986	—Defendants' answer to Plaintiffs' third amended complaint filed.
Jan. 13, 1987	—Plaintiffs' Reply to Defendants' counterclaims filed.
Apr. 13, 1987	—Plaintiffs' Motion for Partial Summary Judgment filed.
Jun. 16, 1987	—Defendants' Motion for Summary Judgment on counterclaims and entry of Default Judgment filed.
Jun. 16, 1987	—Defendants' Motion to Dismiss for lack of jurisdiction and standing filed.
Jun. 16, 1987	—Defendant intervener's answer to third amended complaint and counterclaims filed.
Mar. 8, 1988	—Order denying Defendants' Motion for Summary Judgment on counterclaims entered.
Mar. 15, 1989	—Order denying Plaintiffs' Motion for Partial Summary Judgment and granting Defendants' Motion for Summary Judgment entered.

DATE	PROCEEDINGS
Aug. 28, 1990	—Judgment of District Court denying Plaintiffs' Motion for Partial Summary Judgment, and Granting Defendants' Motion to Dismiss and Defendants' Motion for Summary Judgment entered. Counterclaims are dismissed with prejudice.
Sep. 26, 1990	—Plaintiffs' notice of appeal filed.
Jun. 12, 1991	—Opinion and mandate of the Court of Appeals for the Second Circuit filed.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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85 Civ. 6133 (JES)

NICHOLAS DEMISAY, ERNEST DICKER, JACK FRIEDMAN and ABRAHAM GROSSMAN as Trustees of the Local 144-Southern New York Residential Health Care Facilities Association Pension Fund and Local 144-Southern New York Residential Health Care Facilities Association Welfare Fund, Joseph Unger, as executor for the estate of Moses Unger, individually and d/b/a AMERICAN NURSING HOME, Abraham Grossman, individually and d/b/a BRUCKNER NURSING HOME, LYDEN NURSING HOME and WILLIAMSBRIDGE MANOR NURSING HOME, B.N.H. MANAGEMENT ASSOCIATES, INC., Ernest Dicker, individually and d/b/a CLEARVIEW NURSING HOME, SEACREST NURSING HOME and SHOREVIEW NURSING HOME, Nicolas Demisay, individually and d/b/a CLOVE LAKES NURSING HOME, Desdemona Jones Caruso, individually and d/b/a FIELDSTON LODGE NURSING HOME, Jack Friedman, individually and d/b/a FORT TRYON NURSING HOME, FRANKLIN NURSING HOME, and FRIEDWALD HOUSE HRF, WALD MANAGEMENT ASSOCIATES, INC., 801 190th STREET MANAGEMENT ASSOCIATES, INC., 142-27 FRANKLIN AVENUE MANAGEMENT ASSOCIATES, INC., EDWARD WIZNER, as employee of Clearview Nursing Home and particpiant in the plaintiff funds and defendant funds, MARTHA MULLIGAN, ELIZABETH METCALF, IVY WAITE, CURLENE MCINTOSH, ANELIA TROUT, SEENA MORENO, MICHAEL HERMUR, PAMELA WOODS, ANDREW LENZA, MARY DIBRIENZA, EULOEIA REYES, MARLENE LOUIS, MARY MOZZOLO, FRED GERILLO, DONNA JACOBSEN, ELSA RIVILLA, HELEN LEAVY, CONNIE CARU-

SELLE as employees of Clove Lakes Nursing Home and participants in the plaintiff funds and defendant funds, YVONNE FERNICOLA, DAVID PABON, CYNTHIA LEE, as employees of Franklin Nursing Home and participants in the plaintiff funds and defendant funds, ANITA HARRIS as employee of Seacrest Nursing Home and participant in the plaintiff funds and defendant funds, MARY LINDSAY, as employee of Shoreview Nursing Home and participant in the plaintiff funds and defendant funds,

Plaintiffs,

- against -

LOCAL 144 NURSING HOME PENSION FUND, NEW YORK CITY NURSING HOME-LOCAL 144 WELFARE FUND, PETER OTTLEY, JOHN KELLY, AUSTIN CEDENO, FRANK McKINNEY, BARTHOLOMEW J. LAWSON, FRED WILKENS, WILLIAM McCARTHY and MARSHA McLENDON, as Trustees of the Local 144 Nursing Home Pension Fund and New York City Nursing Home-Local 144 Welfare Fund,

Defendants.

THIRD AMENDED COMPLAINT

NATURE OF THE ACTION

1. This is an action under 29 U.S.C. §§ 302 and 1132 to recover for the Local 144-Southern New York Residential Health Care Facilities Association Pension Fund and the Local 144-Southern New York Residential Health Care Facilities Association Welfare Fund (hereinafter collectively referred to as the "Southern Funds") that portion of the corpuses of the Local 144 Nursing Home Pension Fund and New York City Nursing Home-Local 144 Welfare Fund (hereinafter collectively referred to as the "Greater Funds") that represents the contributions made by plaintiff employers on behalf of plaintiff em-

ployees and all other similarly situated employees, and as to which the Southern Funds have assumed the corresponding liabilities. Plaintiff employees also seek a declaration under these same statutory provisions that the defendant trustees have breached their fiduciary duty by refusing to transfer these funds and thereby failing to utilize such funds for the sole and exclusive benefit of the employees for whom they were contributed. Finally, this action is commenced under 29 U.S.C. § 1451 to require the defendant trustees of the Greater Funds to adopt rules on asset transfer as required by 29 U.S.C. § 1414, which rules would require transfer of the assets sought pursuant to the claims under 29 U.S.C. §§ 302 and 1132.

THE PARTIES

2. Plaintiffs Nicholas Demisay, Ernest Dicker, Jack Friedman and Abraham Grossman are the duly designated management trustees of the Southern Funds. The Southern Funds are duly established trust funds, existing pursuant to 29 U.S.C. § 186(c)(5), and are "employee benefit plans" within the meaning of 29 U.S.C. § 1002(3).

3. Plaintiffs Joseph Unger, as executor for the estate of Moses Unger, Abraham Grossman, Ernest Dicker, Nicholas Demisay and Desdemona Jones Caruso are, and all times material hereto were, owners and operators of health care facilities and "employers" within the meaning of 29 U.S.C. § 1002(5). In or about 1984, Abraham Grossman ceased being an employer insofar as he does business as Bruckner Nursing Home, which has not been a party to a collective bargaining agreement with Local 144, Hotel, Hospital, Nursing Home & Allied Services Union, SEIU, APL-CIO (sic) ("Local 144") since on or about that same date.

4. Plaintiff Jack Friedman is an owner and operator of health care facilities, and at certain times material hereto was an "employer" within the meaning of 29

U.S.C. § 1002(5). (Plaintiff Friedman and the plaintiffs identified in paragraph 3 hereinafter shall be referred to collectively as the "Employers").

5. Plaintiff B.N.H. Management Associates, Inc. ("B.N.H."), Wald Management Associates, Inc. ("Wald"), 801 190th Street Management Associates, Inc. ("801 Management") and 142-27 Franklin Avenue Management Associates, Inc. ("Franklin Management") (hereinafter referred to collectively as the "Management Companies") are, and at certain times material hereto were, "employers" within the meaning of 29 U.S.C. § 1002(5).

6. All the plaintiff employers are members of Southern New York Residential Health Care Facilities Association, Inc. ("Southern New York"), a nonprofit trade association chartered under New York law. Each plaintiff employer negotiates and executes an individual collective bargaining agreement with Local 144.

7. Plaintiffs Edward Wizner, Martha Mulligan, Elizabeth Metcalf, Ivy Waite, Curlene McIntosh, Anelia Trout, Seena Morena, Michael Heimur, Pamela Woods, Andrew Lenza, Mary DiBrienza, Euloeia Reyes, Marlene Louis, Mary Mozzolo, Fred Gerillo, Donna Jacobsen, Elsa Rivilla, Helen Leavy, Connie Caruselle, Yvonne Fernicola, David Pabon, Cynthia Lee, Anita Harris and Mary Lindsay are, and at all times material hereto were, employees, within the meaning of 29 U.S.C. § 1002(6), of either one of the Employers or one of the Management Companies and participants, within the meaning of 29 U.S.C. § 1002(7), in either the Greater Funds and/or Southern Funds (hereinafter referred to collectively as the "Employees").

8. Upon information and belief, defendants Local 144-Nursing Home Pension Fund and New York City Nursing Home-Local 144 Welfare Fund ("Greater Funds") are, and at all times material hereto were, jointly trusteed, multi-employer trust funds created and existing pursuant to 29 U.S.C. § 186(c)(5) and "employee benefit plans"

within the meaning of 29 U.S.C. § 1002(3). The Greater Funds principal offices are located within the County and State of New York.

9. Upon information and belief, defendants Peter Ottley, John Kelley, Austin Cedeno, Frank McKinney, Bartholomew Lawson, Fred Wilkens, William McCarthy and Marsha McLendon are, and at all times material hereto were, the duly designated trustees of the Greater Funds.

JURISDICTION AND VENUE

10. Jurisdiction over the subject matter of this action is predicated on Section 302 of the Labor Management Relations Act, 29 U.S.C. § 186; the Employee Retirement Income Security Act ("ERISA"), as amended, 29 U.S.C. §§ 1104, 1132(e)-(f), 1414, 1451(c); and 28 U.S.C. §§ 1331 and 2201.

11. Venue is based on 29 U.S.C. §§ 1132(e), 1451(d); and 28 U.S.C. § 1391(b). The Greater Funds are administered, and all defendants transact business, within this judicial district; the breach of fiduciary duty hereinafter alleged took place in this district; and the causes of action hereinafter alleged arose within this district.

BACKGROUND

12. Until in or about 1981, the plaintiff Employers were all members of Greater New York Health Care Facilities Association, Inc. ("Greater New York")—a multi-employer bargaining association—and thereby were parties to the collective bargaining agreements between Greater New York and Local 144. Under those agreements, the Plaintiff Employers were contractually obliged, and did contribute to the Greater Funds on behalf of all their employees covered by those agreements, including the plaintiff Employees.

13. Upon withdrawing from Greater New York in or about 1981, the plaintiff Employers joined Southern New

York and negotiated and executed individual collective bargaining agreements with Local 144.

14. Until November 1984, each plaintiff Employer, pursuant to its individual collective bargaining agreements with Local 144, was contractually obliged and did contribute to the Greater Funds on behalf of all their employees who were covered by those agreements, including plaintiff Employees.

15. On November 30, 1984, following the expiration and termination of each Employer's 1981-1984 collective bargaining agreements, B.N.H., as the employer at Bruckner Nursing Home, and each plaintiff Employer executed new individual collective bargaining agreements with Local 144. Each such agreement contains an identical section ("Southern Funds Section") providing for the establishment of the Southern Funds, which funds are to provide the covered employees with the same level of benefits as were then provided to them by the Greater Funds. A copy of one such collective bargaining agreement containing the Southern Funds Section is attached hereto as Exhibit A.

16. The Southern Funds Section of each such collective bargaining agreement provides in relevant part:

Litigation

It is understood that members of Southern [New York Residential Health Care Facilities Association, Inc. ("Southern New York") (i.e., Employers and Management Companies)] and authorized contributors may commence litigation against Local 144-Greater New York Funds to obtain for the Local 144-Southern Pension, Local 144-Southern Welfare and Local 144-Southern Education Funds and Local 144-Southern Dental Account the portion of the corpus of each corresponding Local 144 Fund attributable to the contributions of members of Southern and au-

thorized contributors, on the condition that upon receipt of such monies the Local 144-Southern Funds shall assume liabilities of the Local 144-Greater New York Funds to employees of Southern members and/or authorized contributors. The Union hereby agrees and acknowledges that members of Southern and/or authorized contributors may bring an action for partition and segregation of the Greater New York Fund reserves and the Union shall not oppose such litigation to the extent it is consistent with applicable law.

It is understood and agreed that as of the operational date of the Local 144-Southern Pension Fund, that the Local 144-Southern Pension Fund shall be established on a defined contribution basis with a target benefit of Three Hundred Fifty Dollars ($350.00) per month. The Local 144-Southern Pension Fund shall be converted to a defined benefit plan as soon as practicable.

17. The Southern Funds Section of each such collective bargaining agreement further provides that the signatory employer shall continue to contribute to the Greater Welfare Fund until the date two months prior to the operational date of the Southern Funds. In accordance with this provision, the Employers and/or Management Companies made contributions to the Greater Welfare Fund on behalf of their covered employees, including plaintiff Employees.

18. On or about October 18, 1985, valid and lawful trust agreements were executed establishing the Southern Funds. Copies of those trust agreements are attached hereto as Exhibits B and C.

19. On or about October 18, 1985, at a duly constituted meeting of the trustees of the Southern Funds, it was agreed that the Southern Funds would become operational on December 1, 1985. A true and correct copy of the minutes of that meeting is attached hereto as Exhibit D.

20. On or about November 5, 1985, the trustees of the Southern Funds, at a duly constituted meeting thereof, agreed that the Pension Fund of the Southern Fund shall be established as a defined benefit plan with a benefit of Three Hundred Fifty Dollars ($350.00) per month. A true and correct copy of the minutes of that meeting are attached hereto as Exhibit E.

21. On or about November 5, 1985, the trustees of the Southern Funds, at a duly constituted meeting thereof, approved the Southern Pension Fund's assumption of the Greater Pension Fund's unvested liabilities for the past service credits of all participants in the Southern Funds. For example, an employee with nine years of credited service under the Greater Pension Fund who retires after participating in the Southern Pension Fund for one year is deemed vested under the Southern Pension Fund's ten-year service requirement and receives a monthly benefit from the Southern Pension Fund based on ten years of service. Thus, in this example, the Southern Pension Fund has assumed the Greater Pension Fund's liability for nine years' service credit. Despite this assumption of liabilities, the specific provision of the Employees' collective bargaining agreements and due demand therefor, the Greater Pension Fund has retained that portion of its corpus attributable to contributions made by the Employers and Management Companies and for which the Greater Pension Fund does not now have a corresponding liability by virtue of the Southern Pension Fund's assumption of liability.

22. At the same time, the Southern Welfare Fund assumed liability for welfare coverage of all participants in the Southern Funds. The Greater Welfare Fund, on information and belief, possesses significant reserves attributable to contributions made by the Employers and/or Management Companies on behalf of their employees but to whom the Greater Welfare Fund no longer has an obligation to provide welfare coverage by virtue of the Southern Welfare Fund's assumption of liability.

23. On or about October 1, 1985, the Employers and/or Management Companies ceased making contributions to the Greater Funds and began making contributions to the Southern Funds or its escrow account on behalf of their covered employees, including plaintiff Employees, in accordance with the terms of the collective bargaining agreements each has with Local 144.

24. Since October 1, 1985 to date, the Employers and/or Management Companies have continued to make contributions to the Southern Funds, or its escrow account, in accordance with the governing collective bargaining agreements and trust agreements on behalf of their covered employees including plaintiff Employees.

25. As of December 1, 1985, all of the covered employees of the Employers and/or Management Companies, approximately 1,981 in number, ceased participating in the Greater Funds and commenced participating in the Southern Funds. Since that date, the Southern Funds have provided all of the covered employees of the Employers and/or Management Companies with the same benefits as were provided to them by the Greater Funds.

FIRST CLAIM FOR RELIEF

26. Plaintiffs repeat and incorporate herein by reference the allegations contained in Paragraphs 1-25 of this Complaint.

27. Both the Greater Funds and the Southern Funds are jointly trusteed funds established pursuant to 29 U.S.C. § 186(c)(5) for the sole and exclusive benefit of plaintiff Employees and all others similarly situated who are employees of the Employers and/or Management Companies and who are within Local 144's bargaining unit ("Similarly Situated Employees").

28. From the date on which each Employer and/or Management Company became obligated to contribute to the Greater Funds pursuant to a Local 144 collective bar-

gaining agreement until September 30, 1985, each Employer and/or Management Company made such contributions on behalf of their employees covered by those funds, including plaintiff Employees.

29. On December 1, 1985, the Southern Funds became operational and the Greater Funds ceased providing benefits to the plaintiff Employees and all Similarly Situated Employees other than those benefits which had vested on or before that date.

30. Upon information and belief, the Greater Funds maintain substantial corpuses derived in part from contributions made by the Employers and/or Management Companies on behalf of the plaintiff Employees and Similarly Situated Employees and for which the corresponding liability has been assumed by the Southern Funds.

31. Although the defendant trustees are required by their fiduciary obligation under 29 U.S.C. § 186(c)(5) to transfer to the Southern Funds that portion of Greater Funds' corpuses that is attributable to the contributions made by the Employer and/or Management Companies on behalf of the plaintiff Employees and Similarly Situated Employees and for which the Southern Funds have assumed the corresponding liability, they have failed to do so.

32. As a direct and proximate result of the Greater Funds' failure to make such a transfer to the Southern Funds, the Greater Funds are now structured and are being administered in violation of the requirements of 29 U.S.C. § 186(c)(5), as contributions made by the Employers and/or Management Companies are not being used for the sole and exclusive benefit of their employees.

SECOND CLAIM FOR RELIEF

33. This Second Count is brought against defendants Peter Ottley, John Kelly, Austin Cedeno, Frank McKinney, Bartholomew Lawson, Fred Wilkens, William Mc-

Carthy and Marsha McLendon as trustees of the Greater Funds to enforce the rights of plainitff Employees under Section 404 of ERISA, 29 U.S.C. § 1104.

34. Plaintiffs repeat and incorporate herein by reference the allegations contained in Paragraphs 1-25 and 27-31.

35. The defendant trustees are fiduciaries within the meaning of 29 U.S.C. §§ 1002 (21) (A), 1102(a) and are required in that capacity to administer the Greater Funds solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to the participants and their beneficiaries.

36. By failing to transfer to the Southern Funds that portion of the Greater Funds' corpuses attributable to contributions made by the Employer and/or Management Companies, and for which the Southern Funds have assumed the corresponding liabilities, the defendant trustees have failed to discharge their fiduciary duties to administer the Greater Funds solely in the interest of the participants and beneficiaries thereof.

37. In committing such a breach of their fiduciary duties, the defendant trustees have favored those individuals who continue to participate in the Greater Funds over those participants who are now participants in the Southern Funds, including plaintiff Employees.

38. As a direct and proximate result of defendant trustees' breach of their fiduciary duties, plaintiff Employees have suffered the loss of an as yet undetermined amount in the benefits to which they are entitled or may become entitled to under the Southern Funds.

THIRD CLAIM FOR RELIEF

39. This Third Count is brought against defendants Peter Ottley, John Kelley, Austin Cedeno, Frank McKinney, Bartholomew Lawson, Fred Wilkens, William Mc-

Carthy and Marsha McLendon as trustees of the Greater Funds to enforce plaintiff Employees' rights under ERISA, Section 404, 29 U.S.C. § 1104 and on behalf of all plaintiffs to require compliance with 29 U.S.C. § 1414.

40. Plaintiffs repeat and incorporate herein by reference the allegations contained in Paragraph 1-25, 27-31, and 35-37.

41. The Greater Funds and Southern Funds are multi-employer plans within the meaning of 29 U.S.C. § 1002 (37).

42. The defendant trustees have failed to adopt, as required by 29 U.S.C. § 1414, asset-transfer rules which would permit without unreasonable restriction the transfer of plan assets in connection with the transfer of the plan liabilities.

43. By failing to adopt such asset transfer rules, defendant trustees have administered the Greater Funds in accordance with an instrument that is inconsistent with a provision of subchapter III of ERISA, 29 U.S.C. § 1414, and thereby have committed a prima facie breach of their fiduciary obligation to plaintiff employees under 29 U.S.C. § 1104.

44. As required by the Employers' and B.N.H.'s collective bargaining agreements with Local 144, the Southern Funds have assumed the Greater Pension Fund's unvested liabilities for the past service credits of all participants in the Southern Funds and the Greater Welfare Fund's obligation to provide welfare coverage to these participants. The Greater Funds, however, have not transferred to the Southern Funds that portion of their Funds' corpuses attributable to the contributions made on behalf of such participant employees.

45. As a direct and proximate result of defendant trustees' failure to comply with 29 U.S.C. § 1414 and adopt asset transfer rules and their breach of their

fiduciary obligation to Plaintiff employees, plaintiffs have been deprived of a transfer of the portion of the Greater Funds' corpuses attributable to the contributions made by the Employers and the Management Companies and as to which the Southern Funds have assumed the corresponding liabilities.

WHEREFORE, plaintiffs demand:

(1) That judgment be entered against the defendants on the first claim for relief ordering and directing the defendants to account to the plaintiffs for all transactions, including but not limited to all monies received and paid out by the defendants on behalf of the Greater Funds, and all assets and liabilities of the Greater Funds; and further ordering and directing defendants to transfer to the Southern Funds that sum of money which the Court determines represents the portion of the Greater Funds' corpuses attributable to contributions made by the Employers and/or Management Companies and as to which the Southern Funds have assumed the corresponding liabilities, plus interest thereon.

(2) That judgment be entered against defendant trustees on the second claim for relief enjoining and restraining the defendant trustees from continuing to administer the Greater Funds in the discriminatory manner complained of herein; declaring that defendant trustees breached their fiduciary obligation to plaintiff Employees under 29 U.S.C. § 1104 by so administereing (sic) the Greater Funds; and ordering and directing the defendant trustees to transfer to the Southern Funds that portion of the Greater Funds' corpuses attributable to contributions made by the Employers and/or Management Companies and as to which the Southern Funds have assumed the corresponding liabilities, plus interest thereon.

(3) That judgment be entered against defendant trustees on the third claim for relief declaring that defendant trustees breached their fiduciary obligation to plain-

tiff Employees by failing to adopt the asset transfer rules required by 29 U.S.C. § 1414; and ordering and directing defendant trustees to comply with 29 U.S.C. § 1414 by adopting the required asset transfer rules by and on behalf of the Greater Funds, and thereafter pursuant to said rules, to transfer to the Southern Funds that portion of the Greater Funds' corpuses attributable to contributions made by the Employers and or Management Companies and as to which the Southern Funds have assumed the corresponding liabilities, plus interest thereon.

(4) That this Court grant plaintiffs such other and further relief as it shall deem appropriate and award plaintiffs the cost of this action including reasonable attorney's fees.

GIBSON, DUNN & CRUTCHER

By: /s/ Jonathan L. Sulds
JONATHAN L. SULDS
9 West 57th Street
New York, New York 10019
(212) 906-7924
Attorneys for Plaintiffs

Dated: New York, New York
November 19, 1986

— Exhibit A

Representative Agreement between Local 144 and Southern Association Member, dated November 30, 1984

AGREEMENT made and entered into this 30th day of November, 1984, by and between LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICES UNION, SEIU, AFL-CIO ("Union"), and ———— ("Signatory Facility"), a member of the Southern New York Residential Health Care Facilities Association, Inc., ("Association" or "Southern").

WITNESSETH:

WHEREAS, collective bargaining agreements by and between the Union and Signatory Facilities, members of the Association, expired by their own terms on March 31, 1984; and

WHEREAS, the parties desire to extend and renew the said collective bargaining agreements as applicable;

NOW THEREFORE, in consideration of the mutual promises herein contained, the parties agree as follows:

I. The said collective bargaining agreements, as applicable, are hereby extended and renewed for a period commencing April 1, 1984, and continuing through and including March 31, 1987, as more particularly set forth herein, with all of the terms and conditions therein contained, except as modified in paragraph II hereof.

II. The said collective bargaining agreements, as applicable, as extended and renewed, are modified as follows:

A. WAGE INCREASES

1. There shall be immediately payable to all employees a lump sum payment as follows:

Blue Collar	$275.00
LPN	$375.00
RN	$425.00

2. Effective July 15, 1984, there shall be a six and one-half percent (6½%) increase in the wages of all employees. The dollar amount of such increase shall be as follows:

Blue Collar	$ 21.06
LPN	$ 25.03
RN	$ 29.90

3. Effective July 15, 1985, there shall be an additional seven percent (7%) increase in the wages of all employees. The dollar amount of such increase shall be as follows:

Blue Collar	$ 24.15
LPN	$ 28.70
RN	$ 34.30

3a. The wage increases referred to in subparagraphs "2" and "3" above shall be added to the minimums.

4. Effective March 1, 1986, the parties shall meet to negotiate increases in wages or other economic benefits, if any, to be effective on or after April 1, 1986, through and including March 31, 1987. If the parties have not resolved the matter of wage or economic benefit increases by July 1, 1986, then either party may submit to arbitration, to Eric Schmertz, the question of wages and economic benefit increases, for the period April 1, 1986 through and including March 31, 1987.

The arbitrator shall have no authority to award any wage or other economic benefit increases which, when added to the cost of the contract for the year 1986, shall result in a total labor cost for the year 1986 which may

be in excess of the facility's base year labor cost trended forward to the calendar year 1986 with due credit being given to any moratoria provided herein for the calendar year 1986 and any adjustments provided by the State for the calendar year 1986 to the labor trend factor. (Or in the event that a new and/or different methodology may be applicable to the year 1986 it is understood that the total labor cost of each facility for the year 1986 shall not exceed the total reimbursement to be received by the subject facility pursuant to any reinmbursement methodology that may be applicable at such time.)

The arbitrator's authority with respect to the period January 1, 1987—March 31, 1987 shall be limited and restricted in the same manner as above indicated for the year 1986.

The terms and conditions of paragraph "J" "Reimbursement Clause" are incorporated by reference herein as though the same were more fully set forth at length herein.

In the event the parties fail to reach agreement on the terms to be applicable in the third year of the contract and the parties submit to interest arbitration as hereinabove provided, it is agreed that the arbitrator shall give first priority to consideration of the employer's proposal for freezing the differential for evening and night personnel so that the differential shall be converted from a percentage to a dollar figure.

B. SCHOLARSHIPS

The Signatory Facility shall establish, at its sole expense, a scholarship in the amount of One Thousand Dollars ($1,000) the first year; One Thousand Two Hundred and Fifty Dollars ($1,250) the second year of this Agreement, the recipient selected by a committee of representatives of the Union and Signatory Facility from children of bargaining unit employees.

C. CASUAL EMPLOYEES

The parties agree to adhere to the provisions of paragraphs 6F.1 and 6F.2 of the Blue Collar agreement and 6D.1 and 6D.2 of the LPN and RN agreements which expired on March 31, 1984 (to the extent each such agreement shall apply at the said Signatory Facility).

Regular full-time employees are those whose names appear five (5) days per week on a regular monthly schedule or, where a Signatory Facility maintains regular weekly schedules, on such a schedule.

Regular part-time employees are those whose names appear fewer than five (5) days per week on a regular monthly schedule or, where a Signatory Facility maintains regular weekly schedules, on such a schedule.

Casual employees are those whose names do not appear on a regular monthly schedule or, where a Signatory Facility maintains regular weekly schedules, whose names do not appear on those schedules. No Signatory Facility in any given year shall engage casual employees where the number of hours worked by all casual employees exceeds the ratio of fifteen percent (15%) to the number of hours worked by regularly scheduled employees. Any casual employee who works in excess of eight hundred fifty (850) hours in any calendar year shall receive contractual benefits pro-rated to hours actually worked, except that contributions to the benefit funds shall not be pro-rated. During the first thirty (30) days worked by each casual employee, the casual employee will not accrue sick leave or vacation time. Accrual of such benefits will commence after thirty (30) days worked. It is the intention of the parties that casual employees shall not take the place of regularly scheduled employees on an ongoing basis and shall fill-in for regularly scheduled employees on holidays, personal days, vacation or other non-working benefit days, or in emergencies where the facility could not schedule in the normal course.

It is understood and agreed that the provisions of this "casuals" article shall be deemed controlling for any grievance pending, or which accrued, prior to April 1, 1984 concerning the status of "on calls" or "casuals" and that any such grievance shall be determined in accordance with the provisions of this "casuals" article. A committee consisting of one (1) representative designated by Southern New York and one (1) representative designated by the Union shall review "casual" or "on call" grievances outstanding as of this date with a view towards resolving same. The committee shall issue reports as it desires.

D. CREDIT UNION

Upon written authorization, employers shall deduct from the wages of covered employees voluntary contributions to the Local 144 SEIU Federal Credit Union.

E. NO STRIKE OR LOCKOUT

No employee shall engage in any strike, sit-down, sit-in, slow-down, boycott, interruption of work or other interference with the operations of the employer.

The Union, its officers, agents, representatives and members shall not in any way, directly or indirectly, authorize, assist, encourage, participate in or sanction any strike, sit-down, sit-in, slow-down, boycott, interruption of work or other interference with the operations of the employer, or ratify, condone or lend support to any such conduct or action.

In addition to any other liability, remedy or right provided by applicable law or statute, should a strike, sit-down, sit-in, slow-down, boycott, interruption of work or other interference with the operations of the employer occur, the Union shall immediately upon the request of the employer:

—publicly disavow such action by the employees;

—notify employees of its disapproval of such action and instruct such employees to cease such action and return to work at once.

The employer agrees that it will not lock out covered employees during the term of this Agreement.

F. SOILED LINEN, etc. COMMITTEE

A committee shall be established by the Union and the Association to explore and recommend additional modifications in the areas of soiled linen assignments, incontinent patients and safety.

G. LIFTERS

A mechanical lifting machine shall be provided in each Signatory Facility.

H. HOLIDAYS

Where a holiday falls on a Sunday, it shall be observed on the following Monday. Where the state and federal governments have established different days for the celebration of the same holiday, and where one of those days results in the holiday being celebrated on Monday and the other does not, the one which results in a Monday celebration shall be the one which is applicable hereunder.

I. INDUSTRY STANDARDS CLAUSE

The parties agree that employers whose levels of economic remuneration, benefits and conditions are less favorable to the employees than those contained herein shall be improved pursuant to schedules agreed to by the Union and the Association pertaining to the individual employer. The parties agree that it is their intention to accomplish industry standards among all Signatory Facilities, members of the Association, during the life of this Agreement. This provision shall not be subject to the arbitation clause of this Agreement.

J. REIMBURSEMENT CLAUSE

The parties recognize and agree that each Signatory Facility must receive full reimbursement from the State of New York (and/or other government agencies concerned therewith) for all its labor costs in order to implement the economic terms and conditions of this Agreement.

Notwithstanding anything to the contrary contained in this Agreement, the implementation of the economic terms and conditions of this Agreement is subject to and conditioned upon the continued receipt of full reimbursement by each Signatory Facility from the State of New York (and/or other government agencies concerned therewith) for all its labor costs. Should any Signatory Facility not be fully reimbursed for all its labor costs, then it shall be entitled to a reduction in the labor costs and benefits described in this Agreement pursuant to procedures under the Reimbursement Review panel clause in an amount equal to the amount by which the State of New York (and/or other government agencies concerned therewith) fails to provide full reimbursement for all its labor costs.

The labor costs incurred under this Agreement have been negotiated with specific reference to the labor trend factor set forth by the State of New York in calculating reimbursement rates for long-term health care facilities in the State of New York. The State of New York has represented to the parties that the labor trend factor for 1984 is five and one-half percent (5½%), that the labor trend factor for 1985 is six percent (6%), and that the labor trend factor for 1986 is six percent (6%). Should the labor trend factor for each reimbursement year embraced in this Agreement (*i.e.*, 1984 or 1985 or 1986) be less than as represented by the State of New York—as a result of an initial reimbursement rate promulgation for each Signatory Facility or subsequent adjustment thereto—then, in such event, it shall be presumed that the Sig-

natory Facility has not been fully reimbursed and will be entitled to reductions hereunder. Should the percentage increase of any Signatory Facility of labor costs (calculated from the reimbursement base year to the applicable rate year) be in excess of the labor trend factor promulgated by the State of New York (calculated from the reimbursement base year to the applicable rate year) for such Signatory Facility—as a result of an initial reimbursement rate promulgation for each Signatory Facility or subsequent adjustment thereto—then it shall be presumed that the Signatory Facility has not been fully reimbursed and will be entitled to a reduction hereunder. Should the labor trend factor exceed that as represented by the State of New York by one percent (1%) or more, the parties may meet to negotiate the application of such additional reimbursement.

It is understood that the employer may increase wages and other benefits of non-bargaining unit employees during the period April 1, 1984 through March 31, 1987. To the extent that such increased wages and benefits are no greater than the increases in labor ~~costs~~ under the terms of this agreement, it is understood and agreed that these non-bargaining unit terms and conditions of employment must also be fully reimbursed by the State of New York.

This clause shall survive the term of this agreement.

K. REIMBURSEMENT REVIEW PANEL

The Union and Southern New York hereby establish a Reimbursement Review Panel whose jurisdiction it shall be to hear and to determine all claims for relief or any questions arising out of or in connection with the reimbursement clause of this agreement. The Union shall appoint one (1) member of this Panel, the Association shall appoint one (1) member of this Panel, and the third member of of this Panel shall be The Honorable Eric J. Schmertz. Decisions by the Panel shall be by majority

vote. Mr. Schmertz shall serve as the Chairman and he shall have exclusive discretion to schedule matters coming before the Panel.

A Signatory Facility which makes a claim for relief under the reimbursement clause of the parties' agreement may invoke the jurisdiction of the Reimbursement Review Panel at any time after fifteen days' notice to the Union. The parties shall use said fifteen day notice period to meet and discuss settlement of the claim for relief. With the notice to the Union, the Facility shall provide to the Union a statement of the claim and the relief sought, and such documents related to the claim as are available. Any other documents upon which the Facility intends to support its claim will be provided no later than seven (7) days prior to the first hearing before the Panel. The Reimbursement Review Panel shall meet and issue an award within thirty (30) days of notification by the Signatory Facility that said Signatory Facility invokes the jurisdiction of the Panel. If the Panel fails to render a decision within that time for whatever reason (unless extended by mutual consent of the parties), the appointment of the Chairperson shall be terminated immediately and the Impartial Chairperson shall serve as the Panel Chairperson. A final award must be rendered within 30 days of the appointment of the substitute Chairperson. If no decision is rendered within said 30 day period, the employer may unilaterally implement, in whole or in part, the relief requested provided that no part of the delay is attributable to the employer. However, the decision, when ultimately rendered, shall have retroactive effect, provided that such retroactive effect shall not be for more than a period of sixty (60) days prior to the date the decision is rendered.

The award of this Panel shall be binding upon both parties as any arbitration award and may be enforced in accordance with Civil Practice Law and Rules, Article 75, the Federal Arbitration Act and Section 301, LMRA.

In the event that Mr. Schmertz is unable to serve as Chairman of the Reimbursement Review Panel, then the parties shall meet to select a mutually acceptable successor. In the event that the parties are unable to agree on such successor (within fifteen (15) days of notice by one party to the other of Mr. Schmertz's unavailability), then the Impartial Chairperson shall serve.

L. MOST FAVORED NATIONS CLAUSE

The Union, having committed itself to achieving better working conditions for all employees in the nursing home industry, represents that it intends to provide the same conditions for workers in all nursing homes with which it has collective bargaining agreements.

In the event the Union enters into any collective bargaining agreement, memorandum of agreement or stipulation of agreement on or after April 1, 1984 with a proprietary nursing home and/or residential health care facility in New York City that provides for more favorable economic terms and conditions to the employer than those contained herein, such more favorable terms and conditions shall automatically be applicable to the Southern New York Signatory Facilities, except that this provision shall not apply:

—to an initial collective bargaining agreement with an employer or receiver;

—to renewals of prior agreements where time to reach industry standards is provided; or

—to agreements with insolvent employers.

M. ARBITRATION PROCEDURES

The arbitration procedures shall be modified so as to provide that:

1. All discharge and indefinite suspension grievances must be heard within thirty (30) days of submission to

the Impartial Chairperson. If he/she does not schedule a hearing to be held within thirty (30) days, the grievance shall be referred by the Impartial Chairperson to an alternate arbitrator from a panel to be named by the parties.

2. No adjournment of discharge and indefinite suspension grievances shall be granted for a period of more than two (2) weeks; no second adjournment shall be granted except in extraordinary circumstances.

O. UNIT CLARIFICATION PROCEEDINGS: UNFAIR LABOR PRACTICE CHARGES

There are presently pending before the various Regions of the National Labor Relations Board petitions filed by Signatory Facilities, members of the Association, for unit clarification of bargaining units represented by the Union. Within thirty (30) days of the execution of this Agreement, representatives of such Signatory Facilities shall meet and confer with representatives of the Union in an effort to resolve said outstanding unit clarification petitions, during which time the parties shall use their best efforts to adjourn any scheduled hearings. Failing agreement between the parties to resolve any outstanding unit clarification petition, said unit clarification petition shall then be processed in the normal course by the National Labor Relations Board. Immediately after the execution of this Agreement by a facility, the parties also agree to withdraw, with prejudice, any and all unfair labor practice charges now on file with the National Labor Relations Board against the Union or any Signatory Facility or Southern and not to initiate or reinstitute such charges, in words or substance, at any time in the future.

P. 1976 WELFARE FUND

Thirty percent (30%) forgiveness of 1976 Welfare Fund contributions pursuant to the attached memorandum.

Q. NEW EMPLOYEES

Effective December 1, 1984, wage rates for newly hired employees shall be as follows:

Persons hired from December 1, 1984 through July 14, 1985:

> The minimum prevailing rate for their classification as of March 31, 1984 (e.g., \$324.00) less \$10.00

Persons hired from July 15, 1985 through March 31, 1986:

> The minimum prevailing rate for their classification as of March 31, 1984 (e.g., \$324.00)

Effective with the execution of this agreement, employees hired at less than the minimum prevailing rate for their classification pursuant to conditions posted in the facility shall be paid at the minimum prevailing rate for their classification as of March 31, 1984 (e.g., \$324), except that employees hired at less than the minimum prevailing rate for their classification pursuant to conditions posted in the facility shall have no claim for back pay and the Union shall not assert any claim in any forum.

All newly hired employees shall be eligible for all contract benefits, including wage increases as and when due under the contract. However, contributions to the Local 144 Southern Welfare Fund shall commence for ninety (90) days subsequent to the end of the thirty (30) day probationary period, if such is determined to be actuarially sound, with benefits to commence no later than the date on which the obligation to contribute commences.

Any person currently employed in a Local 144 facility or on leave of absence from same shall not be considered a new hire and shall be employed at the full prevailing rate as provided for herein.

R. SEVERANCE PAY

A committee to study modifications to, funding of, and limitations upon severance pay shall be appointed—two (2) members each by the Union and Southern.

S. SOUTHERN FUNDS

The Union and members of Southern shall establish a pension fund and a welfare fund to provide the same level of benefits as those provided by the Local 144—Greater New York Funds, i.e., the Local 144—Nursing Home Pension Fund, New York City Nursing Home—Local 144 Welfare Fund, and New York City Nursing Home—Local 144 Dental Account ("Local 144—Southern Funds") as of April 1, 1984. There shall be a continuity of benefits for employees to be covered by the Local 144—Southern Funds who previously were covered by the Local 144—Greater New York Funds. No employee shall lose benefits as a result of transfer of his/her coverage from the Local 144—Greater New York Funds to the Local 144—Southern Funds.

It is agreed that any facility becoming a member of Southern or authorized by Southern ("authorized contributions") may contribute to the Local 144—Southern Funds, in lieu of the Local 144—Greater New York Funds, on the terms and conditions as set forth herein at any time prior to the commencement of the operation of the said Funds and at any time within sixty (60) days of the annual anniversary date of such operation, provided however: (1) that the said Funds provide the same level of benefits as those provided by the Local 144—Greater New York Funds, that there shall be a continuity of benefits for employees to be covered by the Local 144—Southern Funds who previously were covered by the Local 144—Greater New York Funds, and that no employee shall lose benefits as a result of transfer of his/her coverage from the Local 144—Greater New York Funds to the Local 144—Southern Funds; and (2) that

the facility has then paid up all of its obligations to the Local 144—Greater New York Funds or made satisfactory arrangements to do so. In the event that the conditions set forth in the preceding sentence are met, the Union hereby covenants, represents and agrees that any residential health care facility desiring to contribute to the Local 144—Southern Funds, and so authorized by Southern, shall be entitled to do so on the terms and conditions hereof in lieu of contributing to the Local 144—Greater New York Funds.

Carriers, Actuaries, Plan Consultants, Administrative Details

Following execution of this Agreement, the parties shall continue to negotiate concerning (a) the selection of carriers, actuaries, plan consultants; and (b) administrative details of the Local 144—Southern Funds, including selection of administrators and designation of office space.

In the event the parties have not resolved these matters by December 30, 1984, then either party may submit its final proposal on selection of carriers, actuaries, plan consultants and administrative details of the Local 144—Southern Funds, including selection of administrator and designation of office space, to interest arbitration before the Honorable Eric J. Schmertz, on a last best offer, item by item basis. In this arbitration the arbitrator shall only have power to select one (1) of the two (2) proposals as to any particular issue. Under any circumstances, the arbitrator shall have no authority to alter contractually agreed-upon levels of contributions nor to vary the date on which the Local 144—Southern Pension Fund and Local 144—Southern Welfare Fund shall become operational, that determination being the sole and exclusive option of Southern.

The award of the arbitrator shall issue no later than February 15, 1985. Should the award not issue by that date, any subsequently issued award shall be void and of no effect.

Failing either agreement of the parties or the issuance of an arbitrator's award of February 15, 1985, Southern, in its sole and exclusive discretion, shall select carriers, actuaries, plan consultants and determine administrative details of the Local 144—Southern Funds, including selection of administrator and designation of office space.

The Local 144—Southern Funds shall become operational and begin to provide benefits as of March 1, 1985, unless Southern shall determine to delay such operational date up to and/or including September 1, 1985.

Agreements and Declarations of Trust

Following execution of this Agreement, the Union and Southern shall meet to negotiate the terms for agreements and declarations of trust for the Local 144—Southern Funds. It is understood and agreed that the Agreements and Declarations of Trust to be adopted shall in any event provide for Joint Trustees and for the adoption of carriers, actuaries, plan consultants and determination of administrative details of the Local 144—Southern Funds, including selection of administrator and designation of office space, as determined by the parties, by the arbitrator as set forth above, or by Southern if the arbitrator does not issue his award by February 15, 1985.

In the event the parties have not agreed on terms for the Agreements and Declarations of Trust by December 30, 1984 (other than those relating to the adoption of carriers, actuaries, plan consultants and determination of administrative details of the Local 144—Southern Funds, including selection of administrator and designation of office space), there shall be submitted to interest arbitration before the Honorable Eric J. Schmertz on a last best offer basis the question what the terms of such Agreements and Declarations of Trust should be. Such award shall issue no later than February 15, 1985.

It is understood and agreed that the Agreements and Declarations of Trust shall in any event provide that in the event of disputes among the Trustees concerning selection of carriers, actuaries, plan consultants and administrative details, including selection of administrator and designation of office space, there shall be deadlock arbitration.

If there shall be no arbitrator's award on the Agreements and Declarations of Trust issued by February 15, 1985, then Southerns' proposed Agreements and Declarations of Trust shall become the parties' Agreements and Declarations of Trust. In the event there shall have been neither agreement on nor an arbitrator's award concerning selection of carriers, actuaries, plan consultants, etc., as set forth on page 19 hereof by February 15, 1985, the effective date of the Agreements shall be determined by Southern in its sole and exclusive discretion, it being understood that the Agreements shall become effective within five (5) days of the Local 144—Southern Funds becoming operational.

Contributions

Members of Southern and authorized contributors shall make contributions to benefit funds on the following basis.

(a) Effective July 1, 1984, through and including two (2) months prior to the operational date of the Local 144—Southern Funds, nine and one-half percent (9½%) of the gross payroll to the Local 144—Greater New York Welfare Fund; four percent (4%) of the gross payroll to an escrow account to be maintained by counsel to the parties ("escrow account").

(b) Effective two (2) months prior to the operational date of the Local 144—Southern Funds, thirteen and one-half percent (13½%) of gross payroll to the escrow account, and no further contributions to the Local 144 Funds.

(c) Effective on the operational date of the Local 144—Southern Funds, nine and one-half percent (9½%) of gross payroll to the Local 144—Southern Welfare Fund and four percent (4%) of gross payroll to the Local 144—Southern Pension Fund. Effective December 1, 1985, increase of one percent (1%) of gross payroll to Local 144—Southern Welfare Fund. Effective January 1, 1986, increase of two percent (2%) of gross payroll to Local 144—Southern Pension Fund.

(d) Members of Southern and authorized contributors shall have no obligation to make or have made contributions to the Local 144—Greater New York Funds for the period January 1, 1984 through and including May 15, 1984 provided that it shall be a condition precedent to this provision that, with credit given for contributions made during that period, all contributions to those Funds otherwise required hereunder of a facility have been made for the calendar year 1984 by January 31, 1985. If such condition is not met by a contributing employer than that employer is not relieved of any obligations under the expired agreement or under this Agreement.

The Union has made a finding and determination that the Signatory Facility, party hereto, has met and satisfied this condition precedent. The Union shall not contest in any forum, by any manner, means, nature or description, the finding and determination that the Signatory Facility has met and satisfied this condition precedent nor shall the Union contest in any forum, of any nature or description, in any manner whatever, the availability of this moratoria provision to the Signatory Facility.

It is understood and agreed that a facility failing to satisfy the condition precedent set forth herein would be obliged, for the period April 1, 1984 through and including June 30, 1984, to contribute nine and one-half percent (9½%) of gross payroll to the Local 144—

Greater New York Welfare Fund and four percent (4%) of gross payroll to the Local 144—Greater New York Pension Fund. However, because the Signatory Facility, party hereto, has satisfied the condition precedent and has no obligation to contribute to the Local 144—Greater New York Funds for the period January 1, 1984-May 15, 1984, it shall be obliged to contribute nine and one-half percent (9½%) of gross payroll to the Local 144—Greater New York Welfare Fund and four percent (4%) of gross payroll to the Local 144—Greater New York Pension Fund only for the period May 16, 1984 through and including June 30, 1984.

To the extent any member of Southern or authorized contributor may have made contributions to the Local 144—Greater New York Funds, for the period January 1, 1984 through and including May 15, 1984 and is entitled to be relieved of the obligation to have made them, such contributions shall be a credit against contributions due the Local 144—Greater New York Funds. Any credit due for contributions to the Local 144—Greater New York Funds to any member of Southern or authorized contributor may be transferred in whole or in part by such facility to any other facility, for any purpose whatever in connection with offsetting liabilities to the Local 144—Greater New York Funds. Any facility to which credit is transferred may use such credit to establish entitlement to be relieved of the obligation to make contributions from January 1, 1984 to May 15, 1984, as set forth in the first sentence of this subparagraph.

(e) Under any circumstances, members of Southern and authorized contributors shall, effective July 1, 1984, have no obligation to make contributions on a current basis to the Local 144—Greater New York Funds except as specifically set forth herein.

(f) The escrow account referred to herein shall be maintained by counsel to the parties for the purpose of building reserves for the Local 144—Southern Funds.

In the event the parties shall have agreed upon carriers, actuaries, and plan consultants or an arbitrator's award issues by February 15, 1985 determining these matters, then the escrow account shall be released to the Trustees of the Local 144—Southern Funds on or before February 28, 1985. In the event that by February 28, 1985, the Union and Southern shall not have agreed upon carriers, actuaries and plan consultants and the designation of an administrator and selection of office space, or that no arbitrator's award shall have issued by February 15, 1985, then counsel shall, on the operational date as determined by Southern, release the escrow account to counsel for Southern who shall make payments from it necessary to commence operation of the Local 144—Southern Funds and thereafter transfer to the Trustees of the Local 144—Southern Funds the balance of the escrow account then remaining. In the event the Local 144—Southern Funds shall not have become operational by September 1, 1985, then and in that event counsel shall release the escrow account as soon as reasonably practicable but no later than November 30, 1985 to the Local 144—Greater New York Pension Fund, and effective as of September 1, 1985, the Employers shall make current contributions to that Fund in the amounts set forth herein, as well as make contributions, effective March 1, 1986 to the Local 144—Greater New York Educational Fund and Dental Account and continue to make contributions to the Local 144—Greater New York Welfare Fund, in the amounts provided for herein.

(g) Gross payroll for purposes of this Article shall be frozen at the payroll rates in effect on September 30, 1983 for the period April 1, 1984 through March 31, 1986. It is understood and agreed that gross payroll for contribution purposes shall not be defined to include days on which there is a strike or lock-out at a Signatory Facility, and that no contributions shall be due the Local 144-Greater New York Funds or the Local 144—Southern

Funds and/or the escrow account by any Signatory Facility for the period of a strike or lock-out.

Dental and Educational

Effective March 1, 1986 or such sooner time as Southern may determine, the Union and Southern shall establish a jointly-trusteed Local 144—Southern Education Fund and add a Local 144—Southern Dental Account to the Local 144—Southern Welfare Fund. Contributions to the Local 144—Southern Dental Account and to the Local 144—Southern Education Fund to provide the same level of benefits as those provided by the Local 144 Health Facilities Training and Upgrading Fund shall commence as of March 1, 1986 at the rate of one percent (1%) of gross payroll to each. Gross payroll shall be frozen at the payroll rates in effect on September 30, 1983 for the period March 1, 1986 through March 31, 1986 for the purposes of contributions to the Dental Account and Education Fund. Administrative details of the Local 144—Southern Education Fund shall parallel those of the Local 144—Southern Pension and Local 144—Southern Welfare Funds. Any dispute as to the creation of that Fund shall be submitted to final and binding arbitration.

It is understood and agreed that the Local 144—Southern Welfare Fund created hereunder shall, on its operational date, provide dental benefits comparable to those provided as of April 1, 1984 by the Local 144—Greater New York Dental Account. In the event the provision of such dental coverage shall require contributions in excess of those agreed upon, the amount of such excess shall be a credit against future contributions otherwise due to the Local 144—Southern Dental Account or the Local 144—Southern Educational Fund, at the option of Southern.

Litigation

It is understood that members of Southern and authorized contributors may commence litigation against the Local 144—Greater New York Funds to obtain for

the Local 144—Southern Pension, Local 144—Southern Welfare and Local 144—Southern Education Funds and Local 144—Southern Dental Account the portion of the corpus of each corresponding Local 144 Fund attributable to the contributions of members of Southern and authorized contributors, on the condition that upon receipt of such monies the Local 144—Southern Funds shall assume all liabilities of the Local 144—Greater New York Funds to employees of Southern members and/or authorized contributors. The Union hereby agrees and acknowledges that members of Southern and/or authorized contributors may bring an action for partition and segregation of the Greater New York Fund reserves and the Union shall not oppose such litigation to the extent it is consistent with applicable law.

It is understood and agreed that as of the operational date of the Local 144—Southern Pension Fund, that the Local 144—Southern Pension Fund shall be established on a defined contribution basis with a target benefit of Three Hundred Fifty Dollars ($350) per month. The Local 144—Southern Pension Fund shall be converted to a defined benefit plan as soon as practicable.

Benefit Improvements

Pension, dental and welfare benefits shall be increased, to the extent actuarially appropriate, and consistent with the agreed-upon contribution levels. It is intended that:

(a) dental coverage be improved;

(b) major medical insurance added; and

(c) pension, benefits be increased to $350.00 per month as of October, 1984; $450.00 per month as of July, 1985; and $500.00 per month as of January, 1986.

T. DURATION

This Agreement shall be effective for the period March 31, 1984 through and including March 31, 1987. It is

specifically understood and agreed that neither party hereto shall engage in economic action, including strikes or lock-outs, against the other, for a period of seventy (70) days after March 31, 1987, but shall instead meet to negotiate the terms of a new agreement. On and after seventy (70) days following March 31, 1987, neither party shall take economic action in connection with such negotiations except upon ten (10) days' notice.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their proper officers as of the day and year first above written.

LOCAL 144, HOTEL, HOSPITAL,
NURSING HOME & ALLIED
SERVICES UNION, SEIU,
AFL-CIO

By: /s/ Peter Ottley

[Signatory Facility]

By: /s/ Jonathan Sulds
On behalf of authorizing
facilities, subject to
ratification
Robert Goldman

Nov. 30, 1984

Local 144, Hotel, Hospital, Nursing
Home & Allied Services Union,
SEIU, AFL-CIO
233 West 49th Street
New York, New York 10019

Gentlemen:

Reference is made to the Industry Standards Clause contained in the collective bargaining agreements entered into this day by and between the Union and Signatory Facilities, members of Southern New York Residential Health Care Facilities Association, Inc. In negotiating this clause, the parties have agreed that the Union shall take no action in any form, be it arbitral, judicial or administrative, to enforce the terms of said clause against any Signatory Facility and that the Union hereby waives any claims under such clause.

If this accurately sets forth our understanding, please confirm by entering your signature in the space provided below.

Very truly yours,

/s/ Jonathan Sulds

/s/ Robert Goldman

AGREED TO, ACCEPTED BY and
CONFIRMED:

LOCAL 144, SEIU, AFL-CIO

By: /s/ Peter Ottley

Nov. 30, 1984

Local 144, Hotel, Hospital, Nursing
Home & Allied Services Union,
SEIU, AFL-CIO
233 West 49th Street
New York, New York 10019

Gentlemen:

Reference is made to paragraph II.A "Wage Increases" contained in the collective bargaining agreements entered into this day by and between the Union and the Signatory Facilities, members of Southern New York Residential Health Care Facilities Association, Inc. In negotiating this clause, the parties have agreed that payment of the wage increases shall be timely to the extent they are made as soon as practicable after reimbursement increases are received to fund such wage increases by each Signatory Facility.

If the foregoing conforms to your understanding, please confirm by your signature below.

Very truly yours,

/s/ Jonathan Sulds

/s/ Robert Goldman

AGREED TO, ACCEPTED BY and
CONFIRMED:

LOCAL 144, SEIU, AFL-CIO

By: /s/ Peter Ottley

Nov. 30, 1984

Local 144, Hotel, Hospital, Nursing
Home & Allied Services Union, SEIU,
AFL-CIO
233 West 49th Street
New York, New York 10019

Gentlemen:

Supplementing the collective bargaining agreement entered into as of this date by and among the Union and the Signatory Facilities, members of Southern New York Residential Health Care Facilities Association, Inc., it is understood and agreed in connection with paragraph II.A.1 ("Wage Increases—Lump Sum") that such lump sum payments shall be made only to regular full and part-time employees employed by a Signatory Facility on April 1, 1984 and continuously thereafter until September 23, 1984. It is further understood and agreed that the amount of the lump sum payment payable to the regular part-time employees shall be pro-rated according to their frequency of work; *e.g.*, a three (3)-day a week regular part-time employee shall receive three-fifths (3/5) of the applicable lump sum payment.

If the foregoing conforms to your understanding, please confirm by your signature below.

Very truly yours,

/s/ Jonathan Sulds

/s/ Robert Goldman

AGREED TO, ACCEPTED BY and
CONFIRMED:

By: /s/ Peter Ottley

Nov. 30, 1984

Local 144, Hotel, Hospital, Nursing
Home & Allied Services Union, SEIU,
AFL-CIO
233 West 49th Street
New York, New York 10019

Gentlemen:

Reference is made to the Reimbursement Clause and the Reimbursement Review Panel Clause contained in the collective bargaining agreements entered into this day by and between the Union and Signatory Facilities, members of Southern New York Residential Health Care Association, Inc. In negotiating these clauses, the parties have agreed that wages which were in effect as of March 31, 1984 should, under no circumstances, be reduced by the Panel. Nor should other economic benefits, which were in effect as of March 31, 1984, be reduced unless and until the increases in wages and other economic benefits provided for in this agreement have been reduced by the Panel to the level in effect as of March 31, 1984.

The foregoing shall be the sole limit on the Panel's authority to reduce labor costs to meet reimbursement shortfall. However, in calculating the amount of reimbursement shortfall, the Panel shall take into account the funds moratoria only in the year given.

The parties further agree that the withdrawal during negotiations of the Union's proposal that the phrase "increased labor costs" be spelled out in paragraph two (2) of the Reimbursement Clause, shall be deemed to be of no significance in the application of said clause.

If this accurately sets forth our understanding, please confirm by entering your signature in the space provided below.

Very truly yours,

/s/ Jonathan L. Sulds

/s/ Robert Goldman

Agreed to, Accepted by and Confirmed:

Local 144, SEIU, AFL-CIO

By: /s/ Peter Ottley

Southern New York Residential Health
Care Facilities Association, Inc.
21 West St.
New York, New York 10017

Gentlemen:

Supplementing the collective bargaining agreement entered into this date by and between the Union and the Signatory Facility Member of Southern New York Residential Health Care Facilities Association, Inc. (Southern Association), it is agreed that the Union shall take no action by way of internal union discipline or otherwise against any individual who crossed a picket line or worked at a struck facility for the period September 24, 1984 to the effective date hereof.

Any disciplinary action taken by a Signatory Facility against an employee for strike lock-out conduct may be submitted to arbitration before the Impartial Chairperson. The parties agree that in the event the arbitrator finds that any of the employees terminated for such alleged misconduct is entitled to reinstatement, the arbitrator, in lieu of reinstatement to the faciilties in which the grievant was employed, shall, upon request of the employer, direct that the grievant be reinstated to one of the other facilities of the Southern Association, provided however that the employee loses no seniority or other rights he has acquired with his original employer, that the original employer pay any backpay that is required under the award, and that the facility to which the employee would then be assigned is in geographic proximity to the one from which he was terminated. The employee shall be assigned to the same shift, same job classification, and receive the same pay.

If this accurately sets forth our understanding, please confirm by entering your signature in the space provided below.

Very truly yours,

/s/ Jonathan Sulds

/s/ Robert Goldman

AGREED TO, ACCEPTED BY and CONFIRMED:

SOUTHERN RESIDENTIAL HEALTH CARE FACILITIES ASSOCIATION, INC.

By: /s/ Peter Ottley

IT IS HEREBY STIPULATED AND AGREED by and between the Signatory Facility and Local 144, Hotel, Hospital, Nursing Home & Allied Services Union (hereinafter "Local 144") that subject to the provisions of this Stipulation the Signatory Facility if it has not already received it shall be and is entitled to a thirty (30%) percent forgiveness of said employer members' liability to the Local 144 New York City Nursing Home Welfare Fund (hereinafter "Welfare Fund") for the year 1976 which is defined as 30% of the total monies that a Signatory Facility was contractually obligated to remit to the Welfare Fund for the period January 1, 1976 through December 31, 1976 plus any interest accrued thereon which is claimed by the Funds.

1. As of sixty (60) days from the date of this Stipulation a Signatory Facility entitled to the "30% forgiveness" and which is claiming same is required to have remitted to the Welfare Fund seventy percent (70%) of its contractual liability to said Welfare Fund for the period January 1, 1976 through December 31, 1976 together with any interest accrued thereon;

2. A Signatory Facility wishing to take advantage of the "30% forgiveness" and which has an indebtedness to the Welfare Fund including the Dental Account and/or the New York City Nursing Home Local 144 Pension Fund, and/or the Local 144 New York City Nursing Home Training and Upgrading Fund for periods up to and including December 31, 1983 must execute within ninety days of the date of this agreement a payment agreement and confession of judgment for all undisputed amounts of said indebtedness less the "30% forgiveness" for said periods pursuant to the guidelines and resolutions promulgated by the Joint Board of Trustees of the "Welfare Fund", "Pension Fund", and "Education Fund";

3. Upon execution of the appropriate documents for the payment agreement and confession of judgment de-

scribed in paragraph "2" herein said Signatory Facility shall be deemed fully and irrevocably credited with the "30% forgiveness".

4. A Signatory Facility which has previously remitted to the "Welfare Fund" the "30% forgiveness" as well as the remainder of the contributions owed in 1976 to the "Welfare Fund" as determined by the "Welfare Fund" accounting office and has not been given credit for it shall be given an irrevocable credit of said amount subject to the conditions stated in this paragraph. In the event that such an employer has no indebtedness to the Funds for the period up to and including December 31, 1983, the Signatory Facility may take advantage of said credit by reducing other contributions to the "Welfare Fund" or transferring said credit to any Facility for offsetting liabilities to the Welfare Fund. Otherwise such credit can only be taken in the manner described in paragraphs "2" and "3".

5. A Signatory Facility currently under a payout agreement and confession of judgment for past indebtedness to the Funds, it shall be deemed to have complied with paragraphs "2" and "3" of this Stipulation and shall be entitled to an irrevocable credit (if not already received) in an amount equal to the "30% forgiveness" provided Signatory Facility has met all its obligations under such an agreement as of a date ninety days from the date of this Stipulation. Such a credit shall be first applied to any past indebtedness to the Funds over and above that covered by the payout agreement, second to meet any remaining obligations under the pay-out agreement and finally as an offset against current contributions over a three month period in equal installments.

6. Upon execution of the Stipulation the Signatory Facility shall withdraw the arbitration proceedings currently pending before Arbitrator Eric Schmertz with regard to the "30% forgiveness".

LOCAL 144, HOTL, (sic)
HOSPITAL, NURSING HOME &
ALLIED SERVICES UNION,
SEIU, AFL-CIO

By: /s/ Peter Ottley

[Signatory Facility]

By: /s/ Jonathan Sulds
On behalf of all authorized
facilities, subject to
ratification

Exhibit B

Local 144—Southern New York Residential Health Care Facilities Association Pension Fund Trust Agreement, Dated October 18, 1985

10/4/85

LOCAL 144—SOUTHERN NEW YORK RESIDENTIAL HEALTH CARE FACILITIES ASSOCIATION PENSION FUND

AGREEMENT AND DECLARATION OF TRUST, dated the 18 day of October, 1985, by, between and among Nicholas D. Demisay, Ernest Dicker, Abraham C. Grossman, Jack Friedman, Peter Ottley, John Kelley, Austin Cedeno and Frank McKinney, constituting all of the Trustees of the Local 144—Southern New York Residential Health Care Facilities Association Pension Fund.

WITNESSETH

WHEREAS, Local 144, Hotel, Hospital, Nursing Home, and Allied Services Union, SEIU, AFL-CIO ("Local 144") on behalf of its members, and members of the Southern New York Residential Health Care Facilities Association, Inc. ("Southern Association") have entered into a collective bargaining agreement which requires the establishment of a pension fund to provide pension benefits to employees of such members of the Southern Association; and

WHEREAS, it is desired to create a pension fund as a trust fund for receiving contributions and for the payment of benefits to eligible participants and their beneficiaries; and

WHEREAS, it is desired to set forth the terms and conditions under which the Pension Fund is to be established, administered and maintained; and

WHEREAS, it is mutually agreed that the Pension Fund shall be administered in accordance with this Agreement and Declaration and Trust and it is desired to define the powers and duties of the Trustees;

NOW, THEREFORE, it is mutually understood and agreed as follows:

ARTICLE I

DEFINITIONS

Section 1. EMPLOYER. The term "Employer" means each employer who (a) is a member of the Southern Association and who is a signatory to a collective bargaining agreement with the Union calling for contributions to the Local 144-Southern New York Residential Health Care Facilities Association Pension Fund, and (b) is not a member of the Southern Association but with whom the Union enters into a collective bargaining agreement calling for contributions to the Pension Fund, provided that the duly authorized approval of the members of the Southern Association is obtained. The term "Employer" shall also mean for the purpose of this Agreement, the Fund, and any affiliated Fund of this Fund, so long as said Fund or Funds make contributions to this Fund on the same basis as any other Employer, pursuant to acceptance by the Trustees.

Section 2. EMPLOYEE. The term "Employee" means any individual employed by an Employer.

Section 3. PARTICIPANT. The term "Participant" as used herein means any Employee or former Employee as defined in the Plan of any Employer who is obligated to make contributions to the Pension Fund on behalf of an Employee who is or may become eligible to receive a benefit of any type from the employee benefit plan established by this Agreement, or whose beneficiaries may be eligible to receive such benefit.

Section 4. TRUSTEES. The term "Trustees" shall mean the Trustees named in and signatories to this Agreement and Declaration of Trust at the initial signing hereof and their respective successors designated and appointed in accordance with this Agreement and Declaration of Trust.

Section 5. AGREEMENT AND DECLARATION OF TRUST. The terms "Agreement and Declaration of Trust" and "Trust" as used herein shall mean this instrument including any amendments hereto and modifications hereof and the trust created hereunder.

Section 6. PENSION PLAN. The term "Pension Plan" and "Plan" as used herein shall mean the employee benefit plan, program, method and procedure for the payment by the Trustees of pension benefits from the Trust Fund in accordance with such rules and regulations relating to eligibility requirements, including computation of benefits and the general administration and operation of the Trust Fund as the Trustees may from time to time adopt and promulgate. The Trustees shall determine the amount of such benefits as required by the collective bargaining agreement.

Section 7. CONTRIBUTIONS. The term "Contributions" as used herein shall mean the payments made to the Trustees by the Employers, whether pursuant to a collective bargaining agreement or other written agreements to which an Employer is a signatory for the purposes set forth in the Agreement and Declaration of Trust.

Section 8. PENSION FUND. The term "Pension Fund" shall mean the "Local 144-Southern New York Residential Health Care Facilities Association Pension Fund."

Section 9. TRUST FUND. The term "Trust Fund" and "Trust" shall mean the contributions paid by Employers, together with all income, increments, earnings and

profits therefrom and all other assets, whether cash, credits, securities of any type, property or interest in property, and life insurance or annuity contract or contracts held in or forming a part of the Trust Fund.

Section 10. BENEFICIARY. The term "Beneficiary" shall mean any person designated by a Participant or by the terms of the Pension Plan who is or may be entitled to a benefit thereunder.

Section 11. INVESTMENT MANAGER. "Investment Manager" shall mean any fiduciary other than a Trustee or named fiduciary having the power to manage, acquire or dispose of any asset of the Trust, and being a registered investment adviser under the Investment Advisers Act of 1940 or a bank defined in that act or an insurance company qualified to exercise said powers under the laws of more than one state of the United States, and has acknowledged in writing that he or it is a fiduciary with respect to the Plan.

Section 12. ACT. The term "Act" shall mean the Employee Retirement Income Security Act of 1974 and any amendments thereto, as well as those regulations promulgated from time to time pursuant thereto.

ARTICLE II

NAME

The Trust Fund shall be known as the "Local 144-Southern New York Residential Health Care Facilities Association Pension Fund", and the Trustees shall conduct the business of the Trust and execute all agreements in that name.

ARTICLE III

PURPOSES

The exclusive purposes of the Trust Fund shall be to provide, pursuant to a Pension Plan formulated pursuant to the provisions of this Agreement and Declaration of

Trust, pension and disability benefits for Participants and, when provided, their Beneficiaries as herein defined and to pay the reasonable expenses of administering the Trust Fund and the Pension Plan and in collecting Contributions.

ARTICLE IV

APPROVAL OF GOVERNMENTAL AGENCIES

Section 1. The Pension Plan established pursuant to this Agreement and Declaration of Trust shall be as qualifies under the Internal Revenue Code and the Act, and as qualifies for tax deductibility of the Contributions made by Employers to the Trust Fund.

Section 2. The Trustees shall submit this Agreement and Declaration of Trust, the Pension Plan and such other information and documents as may be required to the Internal Revenue Service for ruling as to the qualification the Pension Plan under the Internal Revenue Code and the exempt status of the Trust, and to the Department of Labor, the Internal Revenue Service, and any other federal departments or agencies as may be necessary to comply with the provisions of the Act or other applicable law. In making such submissions, the Trustees shall provide, in and to the extent required by applicable law, representations on their behalf, and on behalf of Local 144 and the Employers as may be so required. In making such submissions, the Trustees shall engage the services of an actuary who has been enrolled by the Joint Board for the Enrollment of Actuaries established pursuant to the Act.

ARTICLE V

CONTRIBUTIONS TO THE TRUST FUND

Section 1. The contributions of the Employers shall be made in accordance with the collective bargaining agreements made by the Union, the Southern Association and those Employers who are signatories to a collective bar-

gaining agreement with the Union on behalf of Employees covered by the Pension Plan and shall be paid to the Trustees at regular intervals in accordance with said collective bargaining agreements and, if the collective bargaining agreement is silent, as the Trustees shall direct. Each Employer shall be responsible only for the Contributions payable by him on account of Employees covered by him, except as otherwise required by the Act.

Section 2. Each Employer shall promptly furnish to the Trustees or their authorized representatives on demand such payroll records and data with respect to Employees that the Trustees may require in connection with the administration of the Trust and the Pension Plan; such information and data being limited in nature to such matters as name, classification, social security number and hours worked. The Trustees, or their authorized representatives, may examine the pertinent payroll records of each Employer with respect to Employees whenever the Trustees deem such examination advisable for the proper administration of the Trust.

Section 3.

(a) In addition to all other remedies, if the Trustees, shall complain that any Employer has not made full payment to the Trustees as required under the provision of any collective bargaining agreement, such complaint may be handled in the same manner as provided for the grievance and arbitration provisions contained in whatever collective bargaining agreement applies.

(b) The Trustees are hereby given the right, in their capacity as Trustees, to institute or intervene in any proceeding at law, in equity, or in bankruptcy, for the purpose of effectuating the collection of Contributions due to the Fund from any Employer under the provisions of an applicable collective bargaining agreement or the Act. The Trustees are hereby empowered to seek all damages, including but not limited to liquidated damages (as pro-

vided in the Act), interest at such rates as the Trustees shall from time to time determine, and the costs and legal fees incurred in such proceeding, to which the Fund is or may be entitled.

ARTICLE VI

POWERS, DUTIES, EXPENSES AND FEES OF THE TRUSTEES

Section 1. The Trustees may, among other things:

(a) Accept and receive all Contributions, income, monies and other property, and shall have the exclusive power to hold, invest, reinvest, manage and administer same, subject to the limitations provided herein, for the uses, purposes and trusts herein provided, except to the extent that authority to manage, acquire or dispose of the assets of the Fund is delegated to one or more Investment Managers as herein provided.

(b) Formulate, adopt and administer a Pension Plan, subject to and in accordance with the definition of that term contained in Article I, for the exclusive benefit of the Participants and their beneficiaries in order to provide pension benefits for the Participants and their beneficiaries as and to the extent provided therein. Both the principal and income of the Trust Fund may be disbursed and distributed for the purposes set forth herein and in the Plan.

(c) Promulgate and establish rules and regulations, and authorize the expenditure of monies from the Trust Fund, for the administration and operation of the Pension Plan in order to effectuate the purposes thereof including, without limitation, the payment of all amounts authorized under this Agreement to be paid from the Trust Fund, and in pursuance thereof formulate and establish the conditions of eligibility with respect to age and length of service, past and future service benefit credits, and method of providing pensions, the investment

of funds and any and all other matters which the Trustees, in their discretion, may deem necessary or proper to effectuate the purposes and intent of the Pension Plan provided the effect thereof does not impose on an Employer a liability for Contributions greater than that imposed under a collective bargaining agreement between such Employer and Local 144.

(d) Establish as part of the Trust Fund such reserve or reserves as the Trustees shall in their opinion, based upon actuarial or other financial data furnished to them with respect to the operation of the Pension Plan, deem necessary or advisable for the sound and efficient administration of the Pension Plan.

(e) Receive, purchase or subscribe for any securities or other property of any kind, nature or description, whatsoever that they deem to be acceptable, and to retain such securities or other property in the Trust Fund; and

(f) Enter into agreements, contracts and other instruments for the deposit of funds bearing a reasonable interest rate with banks, trust companies or other institutions whose deposits are insured by the Federal Deposit Insurance Corporation and which accept and hold monies on deposit, and to authorize any such depository to act as custodian of the funds, whether in cash or securities or other property.

(g) Enter into agreements, contracts and other instruments with banks and trust companies for the investment of funds delegating to such banks and trust companies such power and authority as may be necessary to effectuate this purpose, as well as to authorize such depository to act as custodian of the funds, whether in cash, securities or other property.

(h) Acquire and maintain individual annuities, group annuities and life insurance policies (the "Contracts") with an insurance company or companies of reputable standing licensed to do business in the State of New York

as the Trustees determine to be advisable to accomplish the purposes of the Pension Plan, and to pay from the Trust Fund premiums, dues, charges and interest thereon. The Trustees shall collect and receive all dividends or other payments of any kind payable with respect to, under, or arising out of, any of the Contracts or leave the same with the issuing insurance company; to convert from one form of Contract to another form of Contract; to change the person or persons designated in any Contract to receive the proceeds and, without limitation, to exercise any and all of the rights, options or privileges that belong to the absolute owner of any of the Contracts held in the Trust Fund. Nothing contained herein shall require the Trustees to Purchase Contracts to secure benefits under the Pension Plan.

The Trustees may agree with any insurance company to any alteration, modification or amendment of a contract and take any action respecting such contract which is necessary or advisable, and such insurance company shall not be required to inquire into the authority of the Trustees with regard to any dealings in connection with a Contract. If the Trustees so agree with any insurance company, the Trustees, or any person or persons designated by them, may pass upon the validity of claims for benefits under a Contract and, in payment of claims in the amounts approved thereunder, may sign drafts upon the insurance company issuing the Contract.

(i) In their discretion (but acting with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims), may appoint an Investment Manager and may transfer to the Investment Manager all, or such part as they deem desirable, of the assets of the Fund for investment or reinvestment.

The Trustees may enter into an agreement with the Investment Manager which shall be in such form and contain such provisions as the Trustees may deem appropriate and consistent with the provisions of the Act including, but not limited to, provisions relating to delegating to the Investment Manager authority to manage, acquire or dispose of the assets of the Fund transferred to it, the acknowledgement by the Investment Manager that it is a fiduciary with respect to the Plan formulated and adopted by the Trustees, the authority of the Trustees to amend the agreement with the Investment Manager, and the authority of the Trustees to settle the accounts of the Investment Manager on behalf of all persons having an interest in the Fund.

Any such appointment or agreement shall be subject to termination by the Trustees upon thirty (30) days notice. Without limiting the generality of the foregoing, the agreement with the Investment Manager may authorize the Investment Manager to invest and reinvest the assets transferred to it in interests in any trust fund that has been or shall be created and maintained by the Investment Manager as trustee for the collective investment of funds for employee benefit plans qualified under Section 401(a) of the Internal Revenue Code of 1954, as amended, and is exempt under Section 501(a) of the Internal Revenue Code of 1954, as amended (or corresponding provisions of any subsequent Federal revenue law at the time in effect).

(j) Authorize withdrawals of monies from the account or accounts of the Trust Fund, but only by orders or checks signed by such of the Trustees as shall have been authorized in writing by the Trustees to sign the same.

(k) The Trustees may invest and reinvest such funds of the Trust Fund as are not required for current expenditures in such securities as are legal for the investment of trust funds in the State of New York.

Section 2. In addition to all other rights, powers and prerogatives vested in them, the Trustees may:

(a) Hold from time to time any or all of the Trust Fund in cash, uninvested and non-productive of interest or other income.

(b) Sell, transfer or dispose of any securities or other property at any time held by them for cash or on credit; and convert or exchange any securities or other property at any time held by them for other securities or property which the Trustees may deem acceptable, subject to the limitations herein contained. Any such sale, transfer, disposition conversion or exchange may be made publicly or by private arrangement.

(c) Consent to the reorganization, consolidation, merger, dissolution, or readjustment of the finances of any corporation, company or association, any of the securities of which may at any time be held hereunder; exercise any option or options, make any agreement or subscription, pay any expenses, assessments or subscriptions, in connection therewith; and hold and retain any property acquired by means of the exercise of the powers expressed in this paragraph to the extent that it is acceptable to the Trustees.

(d) Compromise, arbitrate, settle, adjust or release any suit or legal proceeding, claim, debt, damage or undertaking due or owing to the Trust Fund on such terms and conditions as the Trustees may deem advisable.

(e) Lease or purchase such premises, materials, supplies and equipment, and employ and retain such legal counsel, investment counsel, administrative, accounting, actuarial, clerical, custodial and other assistants or employees as in their discretion the Trustees may deem necessary or appropriate and to pay their reasonable expenses and compensation out of the Trust Fund.

(f) Vote in person or by proxy securities held by the Trustees, and exercise by attorney in fact or in any other manner any other rights of whatsoever nature pertain-

ing to securities or any other property at any time held in the Trust Fund.

(g) Make, execute and deliver as Trustees any and all instruments in writing necessary or proper for effective exercise of any of the Trustees' powers as stated herein or necessary to accomplish the purposes of the Trust Fund and this Agreement.

(h) Borrow money from any and all types of recognized lending institutions, such as, banks and insurance companies, upon such terms and conditions as the Trustees may deem desirable and, for the sums so borrowed or advanced, the Trustees may issue promissory notes or other evidence of indebtedness as Trustees, and secure the payment thereof by the pledge of any securities or other property in the Trust Fund.

(i) Authorize by resolution any two or more of the Trustees, at least one of whom shall be a Union-appointed Trustee and one of whom shall be an Employer-appointed Trustee, to execute any notice or other instrument in writing and all persons, partnerships, corporations or associations may rely thereon that such notice or instrument has been duly authorized and is binding on the Trust Fund and the Trustees.

(j) Enter into an agreement with one or more banks or trust companies for the purpose of paying benefits granted under the terms of the Pension Plan.

(k) Do all other acts, and take any and all other actions, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder, and for the effectuation of the purposes of the Pension Plan.

Section 3. The Trustees may delegate any of their ministerial powers or duties hereunder to any agent or employee appointed for this purpose by resolution of the Trustees. The Trustees may appoint by resolution a Fund

manager (an individual or organization) to perform administrative and such other duties as the Trustees may from time to time delegate by resolution. The Trustees may allocate responsibilities among themselves and designate persons other than Trustees to carry out fiduciary responsibilities as provided in this Agreement and Declaration of Trust. The power to allocate fiduciary responsibility shall not apply to the allocation of the power to manage and/or control the assets of the Fund and the Plan, other than the power to appoint an Investment Manager or Managers, as provided in Section 1(i) of Article VI.

Section 4. The Trustees shall have and maintain an office in the City and County of New York, which shall be deemed the situs of the Trust Fund. The Trustees may from time to time change the location of said office within the City and County of New York, but no change shall be effective until notice thereof shall have been given to the Union, the Southern Association, and the Employers.

Section 5. Notices given to or by the Trustees, the Southern Association, the Union or the Employers shall be deemed duly given and sufficient if in writing and delivered by messenger with a receipt obtained therefor, or sent by prepaid first class mail, return receipt requested. Except as herein otherwise provided, distribution or delivery of any statement or document required hereunder to be made to the Trustees, Southern Association, Union or Employers shall be sufficient if delivered by messenger with a receipt obtained therefor or if sent by prepaid first class mail.

Section 6. The expenses incurred in the collection of Contributions and in the administration and operation of the Trust Fund shall be paid from the Trust Fund. The Trustees may utilize facilities offered to them by the Union to collect Employer Contributions.

Section 7. The Trustees may, in their sole discretion, enter into such reciprocity agreement or agreements with other funds as they determine to be in the best interest of the Fund, the participants and the beneficiaries, provided that any such reciprocity agreement or agreements shall not be inconsistent with the terms of this Trust Agreement or any collective bargaining agreement under which this Trust Agreement is maintained.

Section 8. Any fiduciary with respect to the Trust or Plan may receive such benefits as he may be entitled to as a participant and may receive reimbursement of expenses properly and actually incurred in the performance of his duties with respect to the Trust or the Plan upon presentation of receipts and like evidence for such expenses. Such reasonable expenses shall include the cost incurred in attendance at and participation in appropriate educational conferences held for fiduciaries, administrators, and fund managers. However no fiduciary shall receive compensation from the Trust or the Plan other than for reimbursement of expenses actually and properly incurred.

ARTICLE VII

ACCOUNTS, RECORDS AND AUDITING THEREOF

Section 1. Any income, recoveries, contributions, forfeitures and any and all monies, securities and properties of any kind at any time received or held by the Trustees hereunder shall be held for the uses and purposes hereof.

Section 2. The Trustees shall procure an audit of the books of the Trust by a certified public accountant or firm thereof as of the end of each fiscal year under the Plan or more often as the Trustees may determine, and shall engage the services of an enrolled actuary, subject to Article VI, Section 8, for the purposes of preparing all actuarial information and actuarial valuations required by law. A copy of this audit along with a Summary Plan Description, collective bargaining agreement, Trust

Agreement, contract or other instruments under which the Plan was established or is operated and all other reports and schedules required by law to be in the Annual Report to the Secretary of Labor shall be available for inspection by all authorized persons, including Participants, Beneficiaries and Employers. These reports shall be available in the principal office of the Pension Fund and at such other locations, including those which may be prescribed by law, as is necessary to make available all pertinent information to all Participants and Employers.

The Trustees shall furnish to each Participant covered under the Plan and to each beneficiary receiving benefits under the Plan, a copy of the current Summary Plan Description and Annual Report as required by law and to each Employer, whether or not required by law. Upon written request of a Participant or Beneficiary receiving benefits under the Plan, the Trustees shall furnish any Participant or Beneficiary receiving benefits under the Plan, on payment of a reasonable charge therefor, a copy of the Summary Plan Description, Annual Report, Trust Agreement or other instruments related to the establishment or operation of the Plan.

Section 3. The Trustees shall have the right to request wage and employment records from Employers with respect to wages and employment and shall have the right to examine said wages and employment records through duly authorized representatives, including certified public accountants, for the purpose of ascertaining the correctness of the Contributions made by the Employer and the eligibility for benefits of Employees.

Section 4. The Trustees shall furnish to an Employer after completion of an audit pursuant to Article VII, Section 3 a written audit report within fifteen (15) days after the completion of the audit. The Employer shall have fifteen (15) days from receipt of the report within which to request from the Trustees a conference to dis-

cuss the audit. The Employer shall pay any delinquent amount mutually agreed upon in such a conference or the amount claimed by the Trustees to be delinquent if mutual agreement is not reached, within thirty (30) days from the date the conference is ended or within fifteen (15) days from receipt of the report if no conference is requested, with interest from the date payment was due at rates to be set from time to time by the Trustees, at published prevailing rates.

Section 5. The expense of the first audit of an Employer's records whenever performed by the representative of the Trustees, pursuant to Article VII, Section 3 hereof, shall be paid by the Fund. If a second or subsequent audit is performed, pursuant to Article VII, Section 3 hereof, same shall be paid by the Fund unless a delinquency is established in an amount in excess of $500.00, in which event the Trustees shall require the Employer to pay for the cost of the audit.

ARTICLE VIII

CLAIMS AND INDIVIDUAL RATES

Section 1. No Employer or Employee, or any person claiming by or through such Employee by reason of having been named a Beneficiary in a certificate or otherwise, shall have any right, title or interest in or to the funds or other property of the Trust Fund or any part thereof, except that Employees and their Beneficiaries shall have the right to such benefits as they are entitled to under the terms of the Plan.

Section 2. No Employee shall have the option to receive any part of an Employer's Contribution instead of the benefits provided by the Fund, or to receive a cash consideration in lieu of such benefits, either upon the termination of the Trust or withdrawal from the Pension Plan through severance of employment or otherwise, except as required by the Act or as specifically authorized by the Trustees.

Section 3. No monies, property or equity of any nature whatsoever in the Trust Fund or benefits or monies payable therefrom shall be subject in any manner, by any Employee, Beneficiary or person claiming through such Employee or Beneficiary, to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, garnishment, mortgage, lien or charge, and any attempt to cause the same to be subject thereto shall be null and void.

Section 4. The assets of the Fund and of the Plan shall not be used for purposes other than the exclusive benefit of Employees or their beneficiaries and as set forth in this Agreement and Declaration of Trust. No claim for a refund of a Contribution or other payment to the Fund by an Employer shall be allowed except as permitted by the Act and then only upon the basis of such evidence as the Trustees may require.

ARTICLE IX

OBLIGATIONS AND LIABILITIES OF TRUSTEES AND OTHER PERSONS

Section 1. Each Trustee or other Plan fiduciary shall exercise the powers of management and investment of the Trust assets granted to him under this instrument with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Such prudent management shall include the diversification of investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to diversify such investments.

Section 2. A fiduciary with respect to the Plan shall not:

(a) deal with the assets of the Trust in his own interest or for his own account;

(b) act in any capacity in a transaction involving the Plan on behalf of a party whose interests are adverse to the interests of the Plan or its Participants or beneficiaries;

(c) receive any consideration for his own account from any party dealing with the Plan in connection with a transaction involving Plan assets.

Section 3. Trustees or other fiduciaries are not liable if Trustee duties have been specifically assigned to a Co-Trustee and that Trustee commits a breach of fiduciary responsibility. Each Trustee shall be liable for a breach of fiduciary duty on the part of another Trustee if knowing of the breach of fiduciary responsibility, he participates in or undertakes to conceal an act or omission of such other Trustee or if with knowledge of a breach by another Trustee he fails to make reasonable efforts to remedy the breach.

Section 4. If pursuant to this instrument a Trustee or other fiduciary allocates fiduciary responsibilities other than trustee responsibilities, said fiduciary is not liable for the acts or omissions of the person designated to carry out such responsibilities, provided that said fiduciary exercised the required degree of prudence, skill and care in making such allocation or designation. Trustee responsibilities for the purpose of this section are those responsibilities provided for in this Agreement and Declaration of Trust other than the power to manage or control the assets of a plan except for the power to appoint an Investment Manager.

Section 5. The Trustees shall not be liable either individually or as Trustees for any acts or omissions of a prudently-appointed Investment Manager (unless they participate knowingly in, or knowingly undertake to conceal, such act or omission, knowing such act or omission to be a breach of the Investment Manager's fiduciary responsibility with respect to the Plan), and shall be

under no obligation to invest or otherwise manage any assets of the Fund that are subject to the management of the Investment Manager.

Section 6. Each Trustee shall be protected in acting upon any paper or document believed to be genuine and to have been made, executed or delivered by the proper party purporting to have made, executed or delivered the same if it was reasonable and prudent under the circumstances to believe that such document was genuine and had been made, executed or delivered by the proper party.

Section 7. The Trustees shall not be bound by any notice, direction, requisition, advice or request, unless and until it shall have been received by the Trustees at the principal place of business of the Trust Fund.

Section 8. No party dealing with the Trustees in relation to the Trust shall be obliged to see to the application of any money or property of the Trust, or to see that the terms of the Trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of the Trustees, and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereon (1) that at the time of the delivery of said instrument the Trust hereby created was in full force and effect, (2) that the said instrument was executed in accordance with the terms and conditions contained in the Agreement and Declaration of Trust, and (3) that the Trustees were duly authorized and empowered to execute such instrument.

Section 9. The costs and expenses (including counsel fees) of any action, suit or proceeding brought by or against the Trustees, or any of them, shall be paid from the Fund, except in the event that in such action, suit or proceeding it is adjudged that a Trustee breached the fiduciary obligations set forth in the Act.

Section 10. With regard to every Article and Section of this Agreement and Declaration of Trust, it is ex-

pressly understood that the rights of individual fiduciaries under ERISA are not waived.

ARTICLE X

APPOINTMENT, REMOVAL, VOTING RESIGNATION AND ADMINISTRATIVE FUNCTIONS OF TRUSTEES

Section 1. There shall be eight (8) Trustees, four (4) of whom shall be designated by the Union as Union-appointed Trustees, and the other four (4) of whom shall be designated by the Southern Association as Employer-appointed Trustees in accordance with procedures established by the Southern Association for this purpose. The Trustees, each for himself or herself, shall accept their appointment as Trustees and consent to act as Trustees hereunder, and declare and agree by virtue of the terms, conditions and provisions of this Agreement to act for the uses, purposes and trusts and with the powers and duties herein set forth and none other.

Section 2. Any vacancy in Union-designated Trustees shall be filled by appointment of the Executive Board of the Union, and any vacancy in Employer-designated Trustees shall be filled by appointment of the Southern Association, in accordance with procedures established by the Southern Association for this purpose. No vacancy or vacancies in the office of the Trustee shall impair the power of the remaining Trustees, acting in the manner herein provided, to administer the affairs of the Trust.

Section 3. The Union and the Southern Association may remove any of their respective appointees or appoint a successor appointee to act in place of such appointee at any time provided the party making any such removal simultaneously appoints a successor in his place. Notice signed by the President of the Union or the Southern Association, as the case may be, shall be given to the remaining Trustees by the Union or the Southern Associa-

tion of the removal of any Trustee appointed by such entity and of the appointment of any successor Trustee.

Section 4. Two (2) Union-appointed Trustees and two (2) Employer-appointed Trustees present in person at any meeting shall constitute a quorum for the transaction of business. Decisions of the Trustees shall be made by the concurring vote of a majority of the Union-appointed Trustees, acting as one group, present at the meeting, and a majority of the Employer-appointed Trustees, acting as one group, present at the meeting.

Section 5. A Trustee may resign by giving notice in writing to the remaining Trustees and to the Union or the Southern Association appointing such Trustee.

Section 6. The President and Secretary-Treasurer of the Union shall by virtue of their offices be members of the Board of Trustees designated by the Union. The other two Union-appointed Trustees shall be designated by the Executive Board of the Union. A letter of the President of the Union setting forth the name or names of the Union-appointed Trustees shall be conclusive evidence of their appointment for all purposes of this Agreement and Declaration of Trust. The Union-appointed Trustees, however, shall be subject to removal by the Executive Board of the Union.

Section 7. The Trustees designated by the Union as Union-appointed Trustees shall serve until removed or until their respective successors are duly appointed and designated except that the President and Secretary-Treasurer of the Union shall serve as long as they continue to hold their respective offices in the Union.

The Trustees designated by the Southern Association as Employer-appointed Trustees shall serve until removed or their respective successors are duly appointed and designated by the Southern Association in accordance with procedures established for this purpose. A letter of the President of the Southern Association setting forth the name

or names of the Employer-appointed Trustees shall be conclusive evidence of their appointment for all purposes of this Agreement and Declaration of Trust.

Section 8. In the event of the resignation, completion of terms of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Union, a successor Trustee shall be designated by a resolution of the Executive Board of the Union, which shall be filed with the remaining Trustees. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Southern Association, his successor Trustee shall be designated by the Southern Association in accordance with procedures established for this purpose and written notice thereof shall be filed by the President of the Southern Association with the remaining Trustees.

Section 9. Action by the Trustees may be taken by a written instrument without a meeting if signed by all of the Trustees then in office.

Section 10. Thê terms of office of the Chairperson and the Secretary of the Trust Fund shall be for one year. The Association President shall serve as Chairperson of the Trust Fund, and the Union President shall serve as Secretary of the Trust Fund for the initial year. Thereafter, the offices of the Chairperson and the Secretary of the Pension Trust Fund shall be rotated between the Union President and the Association President annually.

Section 11. The Chairman or the Secretary or any four (4) Trustees may call a meeting of the Trustees at any time by giving at least five (5) days written notice of the time and date thereof to each Trustee. Meetings shall be held at the offices of the Fund, the Administrator, if one is appointed, or at the offices of either the Union or the Southern Association, as specified in the notice. No meeting shall be held on a legal holiday under the laws of the State of New York or on a Friday after 2:00 o'clock p.m.,

or on a Saturday or Sunday or a religious holiday. Notice shall again be given of an adjournment of a meeting duly called.

Section 12. In the event the Trustees are unable to agree on an action within seven (7) days, after a meeting at which such action was considered, the Trustees shall agree upon an impartial arbitrator to decide the matter or question in dispute and, in the event of failure of the Trustees to agree upon an impartial arbitrator within the seven (7) day period, the Union-appointed Trustee group or the Employer-appointed Trustee group may petition the American Arbitration Association, for the appointment of an impartial arbitrator whose decision on the matter shall be final and binding. A judgment confirming the decision may be entered in any court of competent jurisdiction.

ARTICLE XI

TERMINATION OF THE TRUST

Section 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

(a) In the event the Trust Fund shall be, in the opinion of the Trustees, inadequate to carry out the intent and purposes of this Agreement and the Pension Plan, or to meet the payments due or to become due under the Pension Plan to persons entitled to benefits thereunder;

(b) In the event there are no individuals living who can qualify as Participants or Beneficiaries under the Pension Plan;

(c) In the event that the Pension Benefit Guaranty Corporation institutes a proceeding to terminate the Plan under the provisions of the Act;

(d) In the event of termination as otherwise provided by law.

Section 2. In the event that this Trust shall terminate for any of the reasons set forth in Section 1 of this Article, the assets of the Trust Fund shall be allocated among the participants under the Plan in the manner set forth in the Plan in full accordance with the Act, after making provision for payment by the Fund of any and all obligations of the Trust, including expenses preceding and identical to the termination and after a final audit has been made. Any assets of the Trust remaining after the satisfaction of all liabilities under the Plan to Participants and other Beneficiaries ars required by the Act and payment or provision for the payment of the aforesaid obligation of the Trust shall be distributed in accordance with applicable law.

ARTICLE XII

BONDING AND INSURANCE

Section 1. Every fiduciary with respect to the Plan and every person who handles funds or other property of the Plan, except those exempted by the law, shall be bonded. The amount of such bond shall be fixed each year and shall be no less than 10 percent of the amount of funds handled by the person, or class of persons covered by the bond. subject to the minimum and maximum limitations established by law. Such bonds may not be procured from any surety or other company, agent or broker in whose business operations the Plan or any party in interest has direct or indirect control or significant financial interest. The cost of the premiums for such bonds shall be paid out of the Trust Fund.

Section 2. The Trustees may, in their discretion, obtain and maintain insurance policies, to the extent permitted by the Act, to insure themselves, the Fund as well as Employees or agents of the Fund and cover liability or losses to the Fund or the Plan occurring by reason of the act or omission of a Trustee or fiduciary, or any Employee, agent or designee of them or of the Fund, while engaged

in business for or on its behalf, provided that such insurance policy shall permit recourse against a Trustee or fiduciary as may be required by the Act. The cost of the premiums of such policies shall be paid out of the Fund.

Section 3. The Trustees shall at all times pay from the Trust Fund such premiums as may be required by the Pension Benefit Guaranty Corporation.

Section 4. The Fund shall not pay premiums on any policy issued to indemnify any Trustee for recourse against him in his capacity as a fiduciary.

ARTICLE XIII

EXECUTION AND INTERPRETATION

Section 1. This Agreement and Declaration of Trust may be executed in one or more counterparts, which together shall constitute one and the same document. The signature of a party on any counterpart shall be sufficient evidence of his execution hereof.

Section 2. This Trust is created and accepted in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts and transactions of the parties hereto shall be determined in accordance with the laws of the State of New York, except as preempted by the laws of the United States.

Section 3. The primary purpose of this Agreement and Declaration of Trust being to provide within the limits of the Contributions provided for herein, a practical plan for pension benefits for Participants and their Beneficiaries, it is understood that the form of the Plan, and of this Agreement and Declaration of Trust, shall not give rise to a literal or formal interpretation or construction so as to defeat their primary purpose; such interpretation or construction shall be placed on this Agreement and Dec-

laration of Trust, as will assist in the functioning of the Plan for the benefit of Employees, regardless of form.

Section 4. This Agreement and Declaration of Trust and the Plan established hereunder define the powers, duties, rights and obligations of all persons in relation to the Trust Fund.

Section 5. Should any provision contained in this Agreement and Declaration of Trust or the Plan, be deemed or held to be unlawful, such fact shall not adversely affect the other provisions herein and therein contained, unless such illegality shall make impossible or impractical the functioning of the Fund or the Plan; no Trustee or other party to this Agreement shall be held liable for any act done or performed in pursuance of any provision herein or therein contained (regardless of the fact that such provision may be held unlawful) prior to the time when such provision shall in fact be held to be unlawful by a court of competent jurisdiction.

Section 6. Wherever any words are used in this Agreement and Declaration of Trust in the masculine gender, they shall be construed as though they were also used in the feminine gender in all situations where they would so apply.

ARTICLE XIV

AMENDMENTS

The provisions of this Agreement and Declaration of Trust may be amended to any extent, and at any time, by an instrument in writing executed by the Employer-appointed Trustees and by the Union-appointed Trustees, provided that no such amendment shall be effective unless approved by the Union and the Association. No amendment shall divert any of the Trust Fund then in the hands of the Trustees (and already paid in by Employers to the Trustees) from the purposes of this Trust Fund. Provided further that no such amendment shall permit any return or payments over of any part of the then exist-

ing Trust Fund to any Employer. Any amendment must be such as will continue the Pension Fund's qualification under the Internal Revenue Code and will continue its qualification for tax deductibility of the contributions made by Employers to the Trust Fund. No amendment shall change the manner of designation of Trustees or result in an unequal number of Employer-appointed Trustees and Union-appointed Trustees or change the provisions hereof with respect to quorums for meetings of the Trustees or the making of decisions by the Trustees at a meeting or by written instrument. No amendment shall reduce retroactively the vested benefits of any Participant, retired person or beneficiary as of the time the amendment is adopted and no retroactive amendment shali reduce the accrued benefits of a Participant, pensioner or beneficiary as of the first plan year to which the amendment applies.

ARTICLE XV

EFFECTIVE DATE

The effective date hereof shall be that of the execution of this Trust Agreement.

IN WITNESS WHEREOF, the parties have hereunto affixed their hands and seals this 18 day of October, 1985.

/s/ Peter Ottley, (L.S.)

/s/ John Kelley (L.S.)

/s/ A. Frank McKinney (L.S.)

/s/ Austin Cedeno (L.S.)

/s/ Nicholas D. Demisay (L.S.)

/s/ Jack Friedman (L.S.)

/s/ Ernest Dicker (L.S.)

/s/ Abraham Grossman (L.S.)

Exhibit C

Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund Trust Agreement, dated October 18, 1985

LOCAL 144—SOUTHERN NEW YORK RESIDENTIAL HEALTH CARE FACILITIES ASSOCIATION WELFARE FUND

AGREEMENT AND DECLARATION OF TRUST, dated the 18 day of October, 1985, by and among Nicholas D. Demisay, Ernest Dicker, Abraham C. Grossman, Jack Friedman, Peter Ottley, John Kelley, Austin Cedeno, and Frank McKinney, constituting all of the Trustees of the Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund.

WITNESSETH

WHEREAS, Local 144, Hotel, Hospital, Nursing Home, and Allied Services Union, SEIU, AFL-CIO ("Local 144") on behalf of its members, and members of the Southern New York Residential Health Care Facilities Association, Inc. ("Southern Association") have entered into a collective bargaining agreement which requires the establishment of a welfare fund to provide welfare benefits to employees of such members of the Southern Association; and

WHEREAS, it is desired to create a welfare fund as a trust fund for receiving contributions and for the payment of benefits to eligible participants and their beneficiaries; and

WHEREAS, it is desired to set forth the terms and conditions under which the Welfare Fund is to be established, administered and maintained; and

WHEREAS, it is mutually agreed that the Welfare Fund shall be administered in accordance with this

Agreement and Declaration of Trust and it is desired to define the powers and duties of the Trustees;

NOW, THEREFORE, it is mutually understood and agreed as follows:

ARTICLE I

DEFINITIONS

Section 1. EMPLOYER. The term "Employer" means each employer who (a) is a member of the Southern Association and who is a signatory to a collective bargaining agreement with the Union calling for contributions to the Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund, and (b) is not a member of the Southern Association but with whom the Union enters into a collective bargaining agreement calling for contributions to the Welfare Fund, provided that the duly authorized approval of the members of the Southern Association is obtained. The term "Employer" shall also mean for the purpose of this Agreement, the Fund, and any affiliated Fund of this Fund, so long as said Fund or Funds, make contributions to this Fund on the same basis as any other Employer, pursuant to acceptance by the Trustees.

Section 2. EMPLOYEE. The term "Employee" means any individual employed by an Employer.

Section 3. PARTICIPANT. The term "Participant" as used herein means any Employee or former Employee as defined in the Plan of any Employer who is obligated to make contributions to the Welfare Fund on behalf of an Employee who is or may become eligible to receive a benefit of any type from the employee benefit plan established by this Agreement, or whose beneficiaries may be eligible to receive such benefit.

Section 4. TRUSTEES. The term "Trustees" shall mean the Trustees named in and signatories to this Agreement and Declaration of Trust at the initial signing

hereof and their respective successors designated and appointed in accordance with this Agreement and Declaration of Trust.

Section 5. AGREEMENT AND DECLARATION OF TRUST. The terms "Agreement and Declaration of Trust" and "Trust" as used herein shall mean this instrument including any amendments hereto and modifications hereof and the trust created hereunder.

Section 6. WELFARE PLAN. The term "Welfare Plan" and "Plan" as used herein shall mean the employee benefit plan, program, method and procedure for the payment by the Trustees of hospitalization, accident and sickness, disability, medical and surgical, optical, prescription, dental, life and accidental death and dismemberment benefits from the Trust Fund in accordance with such rules and regulations relating to eligibility requirements, including computation of benefits and the general administration and operation of the Trust Fund as the Trustees may from time to time adopt and promulgate. The Trustees shall determine the amount of such benefits as required by the collective bargaining agreement.

Section 7. CONTRIBUTIONS. The term "Contributions" as used herein shall mean the payments made to the Trustees by the Employers, whether pursuant to a collective bargaining agreement or other written agreements to which an Employer is a signatory for the purposes set forth in the Agreement and Declaration of Trust.

Section 8. WELFARE FUND. The term "Welfare Fund" shall mean the "Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund."

Section 9. TRUST FUND. The term "Trust Fund" and "Trust" shall mean the contributions paid by Employers, together with all income, increments, earnings and profits therefrom and all other assets, whether cash,

credits, securities of any type, property or interest in property, and life insurance or annuity contract or contracts held in or forming a part of the Trust Fund.

Section 10. BENEFICIARY. The term "Beneficiary" shall mean any person designated by a Participant or by the terms of the Welfare Plan who is or may be entitled to a benefit thereunder.

Section 11. INVESTMENT MANAGER. "Investment Manager" shall mean any fiduciary other than a Trustee or named fiduciary having the power to manage, acquire or dispose of any asset of the Trust and being a registered investment adviser under the Investment Advisers Act of 1940 or a bank as defined in that act or an insurance company qualified to exercise said powers under the laws of more than one state of the United States, and has acknowledged in writing that he or it is a fiduciary with respect to the Plan.

Section 12. ACT. The term "Act" shall mean the Employee Retirement Income Security Act of 1974 and any amendments thereto, as well as those regulations promulgated from time to time pursuant thereto.

ARTICLE II

NAME

The Trust Fund shall be known as the "Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund", and the Trustees shall conduct the business of the Trust and execute all agreements in that name.

ARTICLE III

PURPOSES

The exclusive purposes of the Trust Fund shall be to provide, pursuant to a Welfare Plan formulated pursuant to the provisions of this Agreement and Declaration of

Trust, hospitalization, accident and sickness, disability, medical and surgical, optical, prescription, dental, life and accidental death and dismemberment benefits for Participants and where provided, their Beneficiaries as herein defined and to pay the reasonable expenses of administering the Trust Fund and the Welfare Plan and in collecting Contributions.

ARTICLE IV

APPROVAL OF GOVERNMENTAL AGENCIES

Section 1. The Welfare Plan established pursuant to this Agreement and Declaration of Trust shall be as qualifies under the Internal Revenue Code and the Act, and as qualifies for tax deductibility of the Contributions made by Employers to the Trust Fund.

Section 2. The Trustees shall submit this Agreement and Declaration of Trust, the Welfare Plan and such other information and documents as may be required to the Internal Revenue Service for ruling as to the qualification of the Welfare Plan under the Internal Revenue Code and the exempt status of the Trust, and to the Department of Labor, the Internal Revenue Service, and any other federal departments or agencies as may be necessary to comply with the provisions of the Act or other applicable law. In making such submissions, the Trustees shall provide, in and to the extent required by applicable law, representations on their behalf, and on behalf of Local 144 and the Employers as may be so required. In making such submissions, the Trustees shall engage the services of an actuary who has been enrolled by the Joint Board for the Enrollment of Actuaries established pursuant to the Act.

ARTICLE V

CONTRIBUTIONS TO THE TRUST FUND

Section 1. The contributions of the Employers shall be made in accordance with the collective bargaining agreements made by the Union, the Southern Association

and those Employers who are signatories to a collective bargaining agreement with the Union on behalf of Employees covered by the Welfare Plan and shall be paid to the Trustees at regular intervals in accordance with said collective bargaining agreements and, if the collective bargaining agreement is silent, as the Trustees shall direct. Each Employer shall be responsible only for the Contributions payable by him on account of Employees covered by him, except as otherwise required by the Act.

Section 2. Each Employer shall promptly furnish to the Trustees or their authorized representatives on demand such payroll records and data with respect to Employees that the Trustees may require in connection with the administration of the Trust and the Welfare Plan; such information and data being limited in nature to such matters as name, classification, social security number and hours worked. The Trustees, or their authorized representatives, may examine the pertinent payroll records of each Employer with respect to Employees whenever the Trustees deem such examination advisable for the proper administration of the Trust.

Section 3.

(a) In addition to all other remedies, if the Trustees, shall complain that any Employer has not made full payment to the Trustees as required under the provision of any collective bargaining agreement, such complaint may be handled in the same manner as provided for in the grievance and arbitration provisions contained in whatever collective bargaining agreement applies.

(b) The Trustees are hereby given the right, in their capacity as Trustees, to institute or intervene in any proceeding at law, in equity, or in bankruptcy, for the purpose of effectuating the collection of Contributions due to the Fund from any Employer under the provisions of an applicable collective bargaining agreement or the Act. The Trustees are hereby empowered to seek all damages, including but not limited to liquidated damages (as pro-

vided in the Act), interest at such rates as the Trustees shall from time to time determine, and the costs and legal fees incurred in such proceeding, to which the Fund is or may be entitled.

ARTICLE VI

POWERS, DUTIES, EXPENSES AND FEES OF THE TRUSTEES

Section 1. The Trustees may, among other things:

(a) Accept and receive all Contributions, income, monies and other property, and shall have the exclusive power to hold, invest, reinvest, manage and administer same, subject to the limitations provided herein for the uses, purposes and trusts herein provided, except to the extent that authority to manage acquire or dispose of the assets of the Fund is delegated to one or more Investment Managers as herein provided.

(b) Formulate, adopt and administer a Welfare Plan, subject to and in accordance with the definition of that term contained in Article I, for the exclusive benefit of the Participants and their beneficiaries in order to provide welfare benefits for the Participants and their beneficiaries as and to the extent provided therein. Both the principal and income of the Trust Fund may be disbursed and distributed for the purposes set forth herein and in the Plan.

(c) Promulgate and establish rules and regulations, and authorize the expenditure of monies from the Trust Fund, for the administration and operation of the Welfare Plan in order to effectuate the purposes thereof including, without limitation, the payment of all amounts authorized under this Agreement to be paid from the Trust Fund.

(d) Establish as part of the Trust Fund such reserve or reserves as the Trustees shall in their opinion, based upon actuarial or other financial data furnished to them

with respect to the operation of the Welfare Plan, deem necessary or advisable for the sound and efficient administration of the Welfare Plan.

(e) Receive, purchase or subscribe for any securities or other property of any kind, nature or description, whatsoever that they deem to be acceptable, and to retain such securities or other property in the Trust Fund; and

(f) Enter into agreements, contracts and other instruments for the deposit of funds bearing a reasonable interest rate with banks, trust companies or other institutions whose deposits are insured by the Federal Deposit Insurance Corporation and which accept and hold monies on deposit, and to authorize any such depository to act as custodian of the funds, whether in cash or securities or other property.

(g) Enter into agreements, contracts and other instruments with banks and trust companies for the investment of funds delegating to such banks and trust companies such power and authority as may be necessary to effectuate this purpose, as well as to authorize such depository to act as custodian of the funds whether in cash, securities or other property.

(h) Acquire and maintain group insurance policies (the "Contracts") with an insurance company or companies of reputable standing licensed to do business in the State of New York as to the extent the Trustees determine to be advisable to accomplish the purposes of the Welfare Plan, and to pay from the Trust Fund premiums, dues, charges and interest thereon. The Trustees shall collect and receive all dividends or other payments of any kind payable with respect to, under, or arising out of, any of the Contracts or leave the same with the issuing insurance company; to convert from one form of Contract to another form of Contract; to change the person or persons designated in any Contract to receive the proceeds and, without limitation, to exercise any and all of the

rights, options or privileges that belong to the absolute owner of any of the Contracts held in the Trust Fund. Nothing contained herein shall require the Trustees to purchase Contracts to secure benefits under the Welfare Plan.

The Trustees may agree with any insurance company to any alteration, modification or amendment of a Contract and take any action respecting such Contract which is necessary or advisable, and such insurance company shall not be required to inquire into the authority of the Trustees with regard to any dealings in connection with a Contract. If the Trustees so agree with any insurance company, the Trustees or any person or persons designated by them may pass upon the validity of claim for benefits under a Contract and, in payment of claims in the amounts approved thereunder, may sign drafts upon the insurance company issuing the Contract.

(i) In their discretion (but acting with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims), may appoint an Investment Manager and may transfer to the Investment Manager all, or such part as they deem desirable, of the assets of the Fund for investment or reinvestment.

The Trustees may enter into an agreement with the Investment Manager which shall be in such form and contain such provisions as the Trustees may deem appropriate and consistent with the provisions of the Act, including, but not limited to, provisions relating to delegating to the Investment Manager authority to manage, acquire or dispose of the assets of the Fund transferred to it, the acknowledgement by the Investment Manager that it is a fiduciary with respect to the Plan formulated and adopted by the Trustees, the authority of the Trustees to

amend the agreement with the investment manager, and the authority of the Trustees to settle the accounts of the Investment Manager on behalf of all persons having an interest in the Fund.

Any such appointment or agreement shall be subject to termination by the Trustees upon thirty (30) days notice. Without limiting the generality of the foregoing, the agreement with the Investment Manager may authorize the Investment Manager to invest and reinvest the assets transferred to it in interests in any trust fund that has been or shall be created and maintained by the Investment Manager as trustee for the collective investment of funds for employee benefit plans qualified under Section 401(a) of the Internal Revenue Code of 1954, as amended, and is exempt under Section 501(a) of the Internal Revenue Code of 1954, as amended (or corresponding provisions of any subsequent Federal revenue law at the time in effect).

(j) Authorize withdrawals of monies from the account or accounts of the Trust Fund, but only by orders or checks signed by such of the Trustees as shall have been authorized in writing by the Trustees to sign the same.

(k) The Trustees may invest and reinvest such funds of the Trust Fund as are not required for current expenditures in such securities as are legal for the investment of trust funds in the State of New York.

Section 2. In addition to all other rights, powers and prerogatives vested in them, the Trustees may:

(a) Hold form time to time any or all of the Trust Fund in cash, uninvested and non-productive of interest or other income.

(b) Sell, transfer or dispose of any securities or other property at any time held by them for cash or on credit; and convert or exchange any securities or other property at any time held by them for other securities or property which the Trustees may deem acceptable, subject to the

limitations herein contained. Any such sale, transfer, disposition, conversion or exchange may be made publicly or by private arrangement.

(c) Consent to the reorganization, consolidation, merger, dissolution, or readjustment of the finances of any corporation, company or association, any of the securities of which may at any time be held hereunder; exercise any option or options, make any agreement or subscription, pay any expenses, assessments or subscriptions, in connection therewith; and hold and retain any property acquired by means of the exercise of the powers expressed in this paragraph to the extent that it is acceptable to the Trustees.

(d) Compromise, arbitrate, settle, adjust or release any suit or legal proceeding, claim, debt, damage or undertaking due or owing to the Trust Fund on such terms and conditions the Trustees may deem advisable.

(e) Lease or purchase such premises, materials, supplies and equipment, and employ and retain such legal counsel, investment counsel, administrative accounting, actuarial, clerical, custodial and other assistants or appropriate and to pay their reasonable expenses and compensation out of the Trust Fund.

(f) Vote in person or by proxy securities held by the Trustees and exercise by attorney in fact or in any other manner any other rights of whatsoever nature pertaining to securities or any other property at any time held in the Trust Fund.

(g) Make, execute and deliver as Trustees any and all instruments in writing necessary or proper for effective exercise of any of the Trustees' powers as stated herein or necessary to accomplish the purpose of the Trust Fund and this Agreement.

(h) Borrow money from any and all types of recognized lending institutions, such as, banks and insurance com-

panies upon such terms and conditions as the Trustees may deem desirable and, for the sums so borrowed or advanced, the Trustees may issue promissory notes or other evidence of indebtedness as Trustees, and secure the payment thereof by the pledge of any securities or other property in the Trust Fund.

(i) Authorize by resolution any two or more of the Trustees, at least one of whom shall be a Union-appointed Trustee and one of whom shall be an Employer-appointed Trustee, to execute any notice or other instrument in writing and all persons, partnerships, corporations or associations may rely thereon that such notice or instrument has been duly authorized and is binding on the Trust Fund and the Trustees.

(j) Enter into an agreement with one or more banks or trust companies or service organizations for the purpose of paying benefits granted under the terms of the Welfare Plan.

(k) Do all other acts, and take any and all other actions, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder, and for the effectuation of the purposes of the Welfare Plan.

Section 3. The Trustees may delegate any of their ministerial powers or duties hereunder to any agent or employee appointed for this purpose by resolution of the Trustees. The Trustees may appoint by resolution a Fund manager (an individual or organization) to perform administrative and such other duties as the Trustees may from time to time delegate by resolution. The Trustees may allocate responsibilities among themselves and designate persons other than Trustees to carry out fiduciary responsibilities as provided in this Agreement and Declaration of Trust. The power to allocate fiduciary responsibility shall not apply to the allocation of the power to manage and/or control the assets of the Fund and the

Plan, other than the power to appoint an Investment Manager or Managers, as provided in Section 1(i) of Article VI.

Section 4. The Trustees shall have and maintain an office in the City and County of New York, which shall be deemed the situs of the Trust Fund. The Trustees may from time to time change the location of said office within the City and County of New York, but no change shall be effective until notice thereof shall have been given to the Union, the Southern Association, and the Employers.

Section 5. Notices given to or by the Trustees, the Southern Association, the Union or the Employers shall be deemed duly given and sufficient if in writing and delivered by messenger with a receipt obtained therefor, or sent by prepaid first class mail, return receipt requested. Except as herein otherwise provided; distribution or delivery of any statement or document required hereunder to be made to the Trustees, Southern Association, Union or Employers shall be sufficient if delivered by messenger with a receipt obtained therefor or if sent by prepaid first class mail.

Section 6. The expenses incurred in the collection of Contributions and in the administration and operation of the Trust Fund shall be paid from the Trust Fund. The Trustees may utilize facilities offered to them by the Union to collect Employer Contributions.

Section 7. The Trustees may, in their sole discretion, enter into such reciprocity agreement or agreements with other funds as they determine to be in the best interest of the Fund, the participants and the beneficiaries, provided that any such reciprocity agreement or agreements shall not be inconsistent with the terms of this Trust Agreement or any collective bargaining agreement under which this Trust Agreement is maintained.

Section 8. Any fiduciary with respect to the Trust or Plan may receive such benefits as he may be entitled to as

a participant and may receive reimbursement of expenses properly and actually incurred in the performance of his duties with respect to the Trust or the Plan upon presentation of receipts and like evidence for such expenses. Such reasonable expenses shall include the cost incurred in attendance at and participation in appropriate educational conferences held for fiduciaries, administrators, and fund managers. However, no fiduciary shall receive compensation from the Trust or the Plan other than for reimbursement of expenses actually and properly incurred.

ARTICLE VII

ACCOUNTS, RECORDS AND AUDITING THEREOF

Section 1. Any income, recoveries, contributions, forfeitures and any and all monies, securities and properties of any kind at any time received or held by the Trustees hereunder shall be held for the uses and purposes hereof.

Section 2. The Trustees shall procure an audit of the books of the Trust by a certified public accountant or firm thereof as of the end of each fiscal year under the Plan or more often as the Trustees may determine, and shall engage the services of an enrolled actuary, subject to Article VI, Section 8, for the purposes of preparing all actuarial information and actuarial valuations required by law. A copy of this audit along with a Summary Plan Description, collective bargaining agreement, Trust Agreement, contract or other instruments under which the Plan was established or is operated and all other reports and schedules required by law to be in the Annual Report to the Secretary of Labor shall be available for inspection by all authorized persons, including Participants, Beneficiaries and Employers. These reports shall be available in the principal office of the Fund and at such other locations, including those which may be prescribed by law, as is necessary to make available all pertinent information to all Participants and Employers.

The Trustees shall furnish to each Participant covered under the Plan and to each beneficiary receiving benefits under the Plan, a copy of the current Summary Plan Description and Annual Report as required by law and to each Employer, whether or not required by law. Upon written request of a Participant or Beneficiary receiving benefits under the Plan, the Trustees shall furnish any Participant or Beneficiary receiving benefits under the Plan, on payment of a reasonable charge therefor, a copy of the Summary Plan Description, Annual Report, Trust Agreement or other instruments related to the establishment or operation of the Plan.

Section 3. The Trustees shall have the right to request wage and employment records from Employers with respect to wages and employment and shall have the right to examine said wages and employment records through duly authorized representatives, including certified public accountants, for the purpose of ascertaining the correctness of the Contributions made by the Employer and the eligibility for benefits of Employees.

Section 4. The Trustees shall furnish to an Employer after completion of an audit pursuant to Article VII, Section 3 a written audit report within fifteen (15) days after the completition of the audit. The Employer shall have fifteen (15) days from receipt of the report within which to request from the Trustees a conference to discuss the audit. The Employer shall pay any delinquent amount mutually agreed upon in such a conference or the amount claimed by the Trustees to be delinquent if mutual agreement is not reached, within thirty (30) days from the date the conference is ended or within fifteen (15) days from receipt of the report if no conference is requested, with interest from the date payment was due at rates to be set from time to time by the Trustees, at published prevailing rates.

Section 5. The expense of the first audit of an Employer's records whenever performed by the representatives of

the Trustees, pursuant to Article VII, Section 3 hereof, shall be paid by the Fund. If a second or subsequent audit is performed, pursuant to Article VII, Section 3 hereof, same shall be paid by the Fund unless a delinquency is established in an amount in excess of $500.00, in which event the Trustees shall require the Employer to pay for the cost of the audit.

ARTICLE VIII

CLAIMS AND INDIVIDUAL RIGHTS

Section 1. No Employer or Employee, or any person claiming by or through such Employee by reason of having been named a Beneficiary in a certificate or otherwise, shall have any right, title or interest in or to the funds or other property of the Trust Fund or any part thereof, except that Employees and their Beneficiaries shall have the right to such benefits as they are entitled to under the terms of the Plan.

Section 2. No Employee shall have the option to receive any part of an Employer's Contribution instead of the benefits provided by the Fund, or to receive a cash consideration in lieu of such benefits, either upon the termination of the Trust or withdrawal from the Welfare Plan through severance of employment or otherwise, except as required by the Act or as specifically authorized by the Trustees.

Section 3. No monies, property or equity of any nature whatsoever in the Trust Fund or benefits or monies payable therefrom shall be subject in any manner, by any Employee, Beneficiary or person claiming through such Employee or Beneficiary, to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, garnishment, mortgage, lien or charge, and any attempt to cause the same to be subject thereto shall be null and void.

Section 4. The assets of the Fund and of the Plan shall not be used for purposes other than the exclusive benefit

of Employees or their beneficiaries and as set forth in this Agreement and Declaration of Trust. No claim for a refund of a Contribution or other payment to the Fund by an Employer shall be allowed except as permitted by the Act and then only upon the basis of such evidence as the Trustees may require.

ARTICLE IX

OBLIGATIONS AND LIABILITIES OF TRUSTEES AND OTHER PERSONS

Section 1. Each Trustee or other Plan fiduciary shall exercise the powers of management and investment of the Trust assets granted to him under this instrument with the care, skill, prudence, and dilegence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Such prudent management shall include the diversification of investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to diversify such investments.

Section 2. A fiduciary with respect to the Plan shall not:

(a) deal with the assets of the Trust in his own interest or for his own account;

(b) act in any capacity in a transaction involving the Plan on behalf of a party whose interests are adverse to the interests of the Plan or its Participants or beneficiaries;

(c) receive any consideration for his own account from any party dealing with the Plan in connection with a transaction involving Plan assets.

Section 3. Trustees or other fiduciaries are not liable if Trustee duties have been specifically assigned to a Co-Trustee and that Trustee commits a breach of fiduci-

ary responsibility. Each Trustee shall be liable for a breach of fiduciary duty on the part of another Trustee if knowing of the breach of fiduciary responsibility, he participates in or undertakes to conceal an act or omission of such other Trustee or if with knowledge of a breach by another Trustee, he fails to make reasonable efforts to remedy the breach.

Section 4. If pursuant to this instrument a Trustee or other fiduciary allocates responsibilities other than trustee responsibilities, said fiduciary is not liable for the acts or omissions of the person designated to carry out such responsibilities, provided that said fiduciary exercised the required degree of prudence, skill and care in making such allocation or designation. Trustee responsibilities for the purpose of this section are those responsibilities provided for in this Agreement and Declaration of Trust other than the power to manage or control the assets of a plan except for the power to appoint an Investment Manager.

Section 5. The Trustee shall not be liable either individually or as Trustees for any acts or omissions of a prudently-appointed Investment Manager (unless they participate knowingly in, or knowingly undertake to conceal, such act or omission, knowing such act or omission to be a breach of the Investment Manager's fiduciary responsibility with respect to the Plan), and shall be under no obligation to invest or otherwise manage any assets of the Fund that are subject to the management of the Investment Manager.

Section 6. Each Trustee shall be protected in acting upon any paper or document believed to be genuine and to have been made, executed or delivered by the proper party purporting to have made, executed or delivered the same if it was reasonably and prudent under the circumstances to believe that such document was genuine and had been made, executed or delivered by the proper party.

Section 7. The Trustees shall not be bound by any notice, direction, requisition, advice or request, unless and until it shall have been received by the Trustees at the principal place of business of the Trust Fund.

Section 8. No party dealing with the Trustees in relation to the Trust shall be obliged to see to the application of any money or property of the Trust, or to see that the terms of the Trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of the Trustees, and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereon (1) that at the time of the delivery of said instrument the Trust hereby created was in full force and effect, (2) that the said instrument was executed in accordance with the terms and conditions contained in the Agreement and Declaration of Trust, and (3) that the Trustees were duly authorized and empowered to execute such instrument.

Section 9. The costs and expenses (including counsel fees) of any action, suit or proceeding brought by or against the Trustees, or any of them, shall be paid from the Fund, except in the event that in such action, suit or proceeding it is adjudged that a Trustee breached the fiduciary obligations set forth in the Act.

Section 10. With regard to every Article and Section of this Agreement and Declaration of Trust, it is expressly understood that the rights of individual fiduciaries under ERISA are not waived.

ARTICLE X

APPOINTMENT, REMOVAL, VOTING RESIGNATION AND ADMINISTRATIVE FUNCTIONS OF TRUSTEES

Section 1. There shall be eight (8) Trustees, four (4) of whom shall be designated by the Union as Union-appointed Trustees; and the other four (4) of whom

shall be designated by the Southern Association as Employer-appointed Trustees in accordance with procedures established by the Southern Association for this purpose. The Trustees, each for himself or herself, shall accept their appointment as Trustees and consent to act as Trustees hereunder, and declare and agree by virtue of the terms, conditions and provisions of this Agreement to act for the uses, purposes and trusts and with the powers and duties herein set forth and none other.

Section 2. Any vacancy in Union-designated Trustees shall be filled by appointment of the Executive Board of the Union, and any vacancy in Employer-designated Trustees shall be filled by appointment of the Southern Association, in accordance with procedures established by the Southern Association for this purpose. No vacancy or vacancies in the office of the Trustee shall impair the power of the remaining Trustees, acting in the manner herein provided, to administer the affairs of the Trust.

Section 3. The Union and the Southern Association may remove any of their respective appointees or appoint a successor appointee to act in place of such appointee at any time provided the party making any such removal simultaneously appoints a successor in his place. Notice signed by the President of the Union or the Southern Association, as the case may be, shall be given to the remaining Trustees by the Union or the Southern Association of the removal of any Trustee appointed by such entity and of the appointment of any successor Trustee.

Section 4. Two (2) Union-appointed Trustees and two (2) Employer-appointed Trustees present in person at any meeting shall constitute a quorum for the transaction of business. Decisions of the Trustees shall be made by the concurring vote of a majority of the Union-appointed Trustees, acting as one group, present at the meeting, and a majority of the Employer-appointed Trustees, acting as one group, present at the meeting.

Section 5. A Trustee may resign by giving notice in writing to the remaining Trustees and to the Union or the Southern Association appointing such Trustee.

Section 6. The President and Secretary-Treasurer of the Union shall by virtue of their offices be members of the Board of Trustees designated by the Union. The other two Union-appointed Trustees shall be designated by the Executive Board of the Union. A letter of the President of the Union setting forth the name or names of the Union-appointed Trustees shall be conclusive evidence of their appointment for all purposes of this Agreement and Declaration of Trust. The Union-appointed Trustees, however, shall be subject to removal by the Executive Board of the Union.

Section 7. The Trustees designated by the Union as Union-appointed Trustees shall serve until removed or until their respective successors are duly appointed and designated except that the President and Secretary-Treasurer of the union shall serve as long as they continue to hold their respective offices in the Union.

The Trustees designated by the Southern Association as Employer-appointed Trustees shall serve until removed or their respective successors are duly appointed and designated by the Southern Association in accordance with procedures established for this purpose. A letter of the President of the Southern Association setting forth the name or names of the Employer-appointed Trustees shall be conclusive evidence of their appointment for all purposes of this Agreement and Declaration of Trust.

Section 8. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Union, a successor Trustee shall be designated by a resolution of the Executive Board of the Union, which shall be filed with the remaining Trustees. In the event of the resignation, completion of term of office, death, disqualifi-

cation, removal, disability or refusal to act of any Trustee designated by the Southern Association, a successor Trustee shall be designated by the Southern Association in accordance with procedures established for this purpose and written notice thereof shall be filed by the President of the Southern Association with the remaining Trustees.

Section 9. Action by the Trustees may be taken by a written instrument without a meeting if signed by all of the Trustees then in office.

Section 10. The terms of office of the Chairperson and the Secretary of the Trust Fund shall be for one year. The Union President shall serve as Chairperson of the Trust Fund, and the Association President shall serve as Secretary of the Trust Fund for the initial year. Thereafter, the offices of the Chairperson and the Secretary of the Welfare Trust Fund shall be rotated between the Union President and the Association President annually.

Section 11. The Chairman or the Secretary or any four (4) Trustees may call a meeting of the Trustees at any time by giving at least five (5) days written notice of the time and date thereof to each Trustee. Meetings shall be held at the offices of the Fund, the Administrator if one is appointed, or at the offices of either the Union or the Southern Association, as specified in the notice, or at another place with the unanimous written consent of the Trustees. No meeting shall be held on a legal holiday under the laws of the State of New York or on a Friday after 2:00 o'clock p.m. or on a Saturday or Sunday or a religious holiday. Notice shall again be given of an adjournment of a meeting duly called.

Section 12. In the event the Trustees are unable to agree on an action within seven (7) days after a meeting at which such action was considered, the Trustees shall agree upon an impartial arbitrator to decide the matter or question in dispute and, in the event of failure of the

Trustees to agree upon an impartial arbitrator within the seven (7) day period, the Union-appointed Trustee group or the Employer-appointed Trustee group may petition the American Arbitration Association, for the appointment of an impartial arbitrator whose decision on the matter shall be final and binding. A judgment confirming the decision may be entered in any court of competent jurisdiction.

ARTICLE XI

TERMINATION OF THE TRUST

Section 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

(a) In the event the Trust Fund shall be, in the opinion of the Trustees, inadequate to carry out the intent and purposes of this Agreement and the Welfare Plan, or to meet the payments due or to become due under the Welfare Plan to persons entitled to benefits thereunder;

(b) In the event there are no individuals living who can qualify as Participants or Beneficiaries under the Welfare Plan; or

(c) In the event of termination as otherwise provided by law.

Section 2. In the event that this Trust shall terminate for any of the reasons set forth in Section 1 of this Article, the assets of the Trust Fund shall be allocated among the Participants under the Plan in the manner set forth in the Plan in full accordance with the Act, after making provision for payment by the Fund of any and all obligations of the Trust, including expenses preceding and incidental to the termination and after a final audit has been made. Any assets of the Trust remaining after the satisfaction of all liabilities under the Plan to Participants and other Beneficiaries as required by the Act and

payment or provision of the payment of the aforesaid obligation of the Trust shall be distributed in accordance with applicable law.

ARTICLE XII

BONDING AND INSURANCE

Section 1. Every fiduciary with respect to the Plan and every person who handles funds or other property of the Plan, except those exempted by the law, shall be bonded. The amount of such bond shall be fixed each year and shall be no less than 10 percent of the amount of funds handled by the person, or class of persons covered by the bond, subject to the minimum and maximum limitations established by law. Such bonds may not be procured from any surety or other company, agent or broker in whose business operations the Plan or any party in interest has direct or indirect control or significant financial interest. The cost of the premiums for such bonds shall be paid out of the Trust Fund.

Section 2. The Trustees may, in their discretion, obtain and maintain insurance policies, to the extent permitted by the Act, to insure themselves, the Fund as well as Employees or agents of the Fund and cover liability or losses to the Fund or the Plan occurring by reason of the act or omission of a Trustee or fiduciary, or any Employee, agent or designee of them or of the Fund, while engaged in business for or on its behalf, provided that such insurance policy shall permit recourse against a Trustee or fiduciary as may be required by the Act. The cost of the premiums of such policies shall be paid out of the Fund.

Section 3. The Fund shall not pay premiums on any policy issued to indemnify any Trustee for recourse against him in his capacity as a fiduciary.

ARTICLE XIII

EXECUTION AND INTERPRETATION

Section 1. This Agreement and Declaration of Trust may be executed in one or more counterparts, which together shall constitute one and the same document. The signature of a party on any counterpart shall be sufficient evidence of his execution hereof.

Section 2. This Trust is created and accepted in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts and transactions of the parties hereto shall be determined in accordance with the laws of the State of New York, except as preempted by the laws of the United States.

Section 3. The primary purpose of this Agreement and Declaration of Trust being to provide within the limits of the Contributions provided for herein, a practical plan for welfare benefits for Participants and their Beneficiaries, it is understood that the form of the Plan, and of this Agreement and Declaration of Trust, shall not give rise to a literal or formal interpretation or construction so as to defeat their primary purpose; such interpretation or construction shall be placed on this Agreement and Declaration of Trust, as will assist in the functioning of the Plan for the benefit of employees, regardless of form.

Section 4. This Agreement and Declaration of Trust and the Plan established hereunder define the powers, duties, rights and obligations of all persons in relation to the Trust Fund.

Section 5. Should any provision contained in this Agreement and Declaration of Trust or the Plan, be deemed or held to be unlawful, such fact shall not adversely affect the other provisions herein and therein contained, unless such illegality shall make impossible or impractical the functioning of the Fund or the Plan; no Trustee or other

party to this Agreement shall be held liable for any act done or performed in pursuance of any provision herein or therein contained (regardless of the fact that such provision may be held unlawful) prior to the time when such provision shall in fact be held to be unlawful by a court of competent jurisdiction.

Section 6. Wherever any words are used in this Agreement and Declaration of Trust in the masculine gender, they shall be construed as though they were also used in the feminine gender in all situations where they would so apply.

ARTICLE XIV

AMENDMENTS

The provisions of this Agreement and Declaration of Trust may be amended to any extent, and at any time, by an instrument in writing executed by the Employer-appointed Trustees and by the Union-appointed Trustees, provided that no such amendment shall be effective unless approved by the Union and the Association. No amendment shall divert any of the Trust Fund then in the hands of the Trustees (and already paid in by Employers to the Trustees) from the purposes of this Trust Fund. Provided further that no such amendment shall permit any return or payments over of any part of the then existing Trust Fund to any Employer. Any amendment must be such as will continue the Welfare Fund's qualification under the Internal Revenue Code and will continue its qualification for tax deductibility of the contributions made by Employers to the Trust Fund. No amendment shall change the manner of designation of Trustees or result in an unequal number of Employer-appointed Trustees and Union-appointed Trustees or change the provisions hereof with respect to quorums for meetings of the Trustees or the making of decisions by the Trustees at a meeting or by written instrument. No amendment shall reduce retroactively the vested benefits of any Participant, retired person or beneficiary as of the time the

amendment is adopted and no retroactive amendment shall reduce the accrued benefits of a Participant, retired person or beneficiary as of the first plan year to which the amendment applies.

ARTICLE XV

EFFECTIVE DATE

The effective date hereof shall be that of the execution of this Trust Agreement.

IN WITNESS WHEREOF, the parties have hereunto affixed their hands and seals this 18 day of October, 1985.

/s/ Peter Ottley (L.S.)

/s/ John Kelley (L.S.)

/s/ Frank McKinney (L.S.)

/s/ Austin Cedeno (L.S.)

/s/ Nicholas D. Demisay (L.S.)

/s/ Jack Friedman (L.S.)

/s/ Ernest Dicker (L.S.)

/s/ Abraham Grossman (L.S.)

Exhibit D

Minutes of Trustees' Meeting of Southern New York Pension and Welfare Funds, dated October 18, 1985

LOCAL 144—SOUTHERN NEW YORK PENSION & WELFARE FUNDS

MINUTES: TRUSTEES' MEETING

October 18, 1985

The trust documents for the Pension and Welfare Funds were signed at approximately 12:15-12:30 p.m. Those trustees signing were: Nicholas Demisay, Ernest Dicker, Jack Friedman, Abraham Grossman, John Kelley, Frank McKinney, and Peter Ottley. Austin Cedeno was not present.

After signature, the First Trustees' Meeting was called to order.

PRESENT:

Nicholas Demisay, Trustee
Ernest Dicker, Trustee
Jack Friedman, Trustee
Abraham Grossman, Trustee
John Kelley, Trustee
Frank McKinney, Trustee
Peter Ottley, Trustee
Howard B. Katz, Administrator
Jonathan Sulds, Esq., Gibson, Dunn & Crutcher
Harvey Weinberg, Esq., Shaw, Goldman, Licitra, Levine & Weinberg
Jeremiah Riddle, Touche Ross & Co.
Barbara Finn-Hammer, Touche Ross & Co.

Irwin Bluestein, Esq., Vladeck, Waldman, Elias & Engelhard
Alan Brown, Esq., Local 144

Discussion held and agreement that December 1, 1985 was to be date Funds were to become operational.

Discussion held regarding the signature of Austin Cedeno. Decided that Mr. Katz would call Mr. Cedeno's office Monday to make an appointment for his signature. Once all documents are signed, copies of the executed agreement will be sent to:

Irwin Bluestein, Esq.
Harvey Weinberg, Esq.
Jonathan Sulds, Esq.

All other originals will be held by Mr. Katz at the Fund office. Photocopies will be sent to Ms. Finn-Hammer at Touche Ross & Co. for forwarding to HIP and Blue Cross.

Mr. Bluestein noted that the benefits of the dental coverage provided by Local 144 had increased as of October 1, 1985 as per the attached schedule. (Local 144 Funds Memorandum dated October 16, 1985). =Discussion was held and agreed as to the order that Trustees' meetings will follow: Welfare Fund first, Pension Fund second.

Mr. Riddle presented the general aspects of investments of the Pension Funds as proposed by Mass Mutual for a defined contribution target benefit plan and explained the method of providing that no employee not yet vested under Local 144—Greater New York Fund would not lose any benefits upon transfer to this Fund.

Mr. Bluestein requested noting that the intent of the Pension Fund was to meet the monthly benefit of $350/month at normal retirement either through the defined contribution target benefit plan, or a defined benefit plan. The employee-trustees group responded that this was their intent first to try through the defined contribution benefit

target plan and upon failure of such, then the defined benefit plan.

In general discussion, it was decided to invite Mass Mutual and Aetna to present their respective plans.

Mr. Katz asked Mr. Riddle if new census data was needed. Mr. Riddle responded in the affirmative, as the census data was now six months old.

Discussion was then held as to the time, place, and agenda of the next Trustees' meeting. October 28, 1985 at 10:00 a.m. at the N.Y.U. Club was agreed upon.

The meeting was adjourned at 1:40 p.m. there being no further business.

Respectfully submitted,

Chairman (Welfare Fund)	Chairman (Pension Fund)
Secretary (Welfare Fund)	Secretary (Pension Fund)

Exhibit E

Minutes of Trustees' Meeting of Southern New York Pension and Welfare Funds, dated November 5, 1985

LOCAL 144—SOUTHERN NEW YORK PENSION & WELFARE FUNDS

MINUTES: TRUSTEES' MEETING

November 5, 1985

PRESENT:

Austin Cedeno, Trustee
Nicholas Demisay, Trustee
Ernest Dicker, Trustee
Jack Friedman, Trustee
Abraham Grossman, Trustee
John Kelley, Trustee
Frank McKinney, Trustee
Peter Ottley, Trustee
Howard B. Katz, Administrator
Irwin Bluestein, Esq., Vladeck, Waldman, Elias & Engelhard
Alan Brown, Esq., Counsel, Local 144
Jonathan Sulds, Esq., Gibson, Dunn & Crutcher
Harvey Weinberg, Esq., Shaw, Goldman, Licitra, Levine & Weinberg
Jeremiah Riddle, Touche, Ross & Co.
Barbara Finn-Hammer, Touche, Ross & Co.

1. *Minutes of First Trustees' Meeting*

As the Trustees have adopted a Defined Benefit Pension Plan, Mr. Bluestein's paragraph was adopted and, therefore, the minutes of the first meeting.

2. *Minutes of Second Trustees' Meeting*

Adopted with a further definition of the activities located on 49th Street for covered employees. Those activities being dental, credit union, educational programs as well as union activities.

3. *Location of Fund Office*

General discussion regarding the investigation into the cost of breaking the lease at 240 West 35th Street. Decided to form a committee consisting of Mr. Demisay and Mr. McKinney to examine alternative sites and, if needed, to retain the services of a broker in order to conduct such search and cost of breaking lease. All locations are to be examined based upon cost, convenience, and availability.

4. *Employees of Fund—Clerical Position*

General discussion regaraing the hiring of employees. Key employees will be interviewed by Mr. Cedeno and Mr. Dicker, all others by Mr. Katz.

Mr. Katz presented qualifications of Mr. Sidney Hull, who was later interviewed by the committee.

5. *Pension Fund—Type of Plan, Defined Contribution Target Vs. Defined Benefit.*

Mr. Riddle presented additional data on costs of guaranteeing those employees not yet fully vested under the Greater New York Pension Fund, who by joining this Fund would lose years of service credit.

Under Defined Contribution the supplemental guarantee would cost approximately $40,000-$80,000 per annum. Upon Defined Benefit $20,000-$40,000 per annum. Mr. Riddle thought that would be a good estimate.

Motion made by Mr. Cedeno for the Fund to adopt a Defined Benefit Pension Plan. Seconded by Mr. Demisay. Motion adopted. No nays. Noted that the language for

the minimum guaranteed benefit to be written as "For those not vested under Greater New York Pension Plan, full recognition of pension credits granted there under."

Touche Ross & Co. will have the responsibility to produce first draft of the Defined Benefit Pension Plan as adopted.

Discussion held regarding those employees having 10 years or more vesting in Greater New York Plan. It is clearly the intent of this Fund (Southern) that payment of benefit be apportioned dependent upon amount of service credits accumulated under each plan. An example of such, i.e., a person with 25 years combined service, 17 years in Greater New York, 8 years in Southern, Greater would be responsible for 17/25 of \$350 benefit or \$238, Southern responsible for 8/25 or \$112. (\$350 being the current maximum benefit). Formula could be stated as:

$$\text{Normal pension rights of employee} = \frac{\text{\# of years of service in Greater N. Y. Fund}}{25} \times 350 + \frac{\text{\# of years of service credits in Local 144-Southern Fund}}{25} \times 350 = \text{\$350 monthly benefit}$$

General discussion was then held regarding the accuracy of data from Greater New York Pension Fund as to years of service for each employee. Decided that when each employee petitions for benefit an individual research of that person's employment history would have to be made.

Motion made to skip to agenda item number 8, adopted, no nays.

8. *Review of Blue Cross Coverage*

Ms. Finn-Hammer reported on progress in obtaining a rate quote from Blue Cross. Blue Cross wanted to ascer-

tain the legality and financial ability of Fund prior to giving rate.

Resolution adopted that all Trustees request that Blue Cross move forward in quoting new rate, but that such resolution did not reflect on Trustees' decision to contract with Blue Cross, and that such contract decision has not been made by the Trustees at this time. Resolution adopted, no nays.

The next Trustees' Meeting will be held on November 11 at 9:00 a.m. at the:

Office of Irwin Bluestein
Vladeck, Waldman, Elias, Engelhard, P.C.
1501 Broadway
New York, N.Y. 10036

The agenda for the meeting will consist of those parts of the agenda tabled at today's meeting, specifically:

1. Review of investment policy of Trustees' regarding Mass Mutual and Aetna proposals.
2. Review of memorandum to employees advising them of benefits until detailed booklets are prepared.
3. Discussion fo (sic) treatment of the 9.5% contribution for August.
4. Escrow Fund—transition.

there being no further business, the meeting was adjourned at 12:45 p.m.

Respectfully submitted,

Chairman (Welfare Fund)	Chairman (Pension Fund)
Secretary (Welfare Fund)	Secretary (Pension Fund)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

ANSWER TO THIRD AMENDED COMPLAINT

Defendants, by their undersigned counsel, answer the third amended complaint (the "complaint") as follows:

1. Defendants admit that the complaint purports to state causes of action under 29 U.S.C. §§ 302, 1132 and 1451, to obtain a portion of the corpus of the defendants Local 144 Nursing Home Pension Fund and New York City Nursing Home—Local 144 Welfare Fund (hereafter collectively referred to as the "Greater New York Funds" or "defendant Funds"), and purports to seek declaratory and injunctive relief in furtherance thereof. Defendants deny, however, that defendants or their agents have acted, or failed to act, in any way so as to give rise to any liability under the statutory provisions cited therein or to warrant the requested reliet.

2. The allegations of paragraph 2 of the complaint concerning the applicability of certain statutory provisions cited therein constitute legal conclusions as to which no answer is required. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2 of the complaint.

3. Defendants admit that Moses Unger and plaintiffs Abraham Grossman, Ernest Dicker, Nicholas Demisay and

Desdemona Jones Caruso were at certain times owners and operators of health care facilities. The allegations of paragraph 3 of the complaint concerning the applicability of certain statutory provisions cited therein constitute legal conclusions as to which no answer is required. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the complaint.

4. Defendants admit that plaintiff Jack Friedman was an owner and operator of health care facilities. The allegations of paragraph 4 of the complaint concerning the applicability of certain statutory provisions cited therein constitute legal conclusions as to which no answer is required. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 2 of the complaint.

5. The allegations of paragraph 5 of the complaint concerning the applicability of certain statutory provisions cited therein constitute legal conclusions as to which no answer is required. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 3 of the complaint.

6. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the complaint.

7. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations that the plaintiffs named in paragraph 7 of the complaint were or are employees of any of the other plaintiffs, or participants in the plaintiffs Local 144—Southern New York Residential Health Care Facilities Association Pension Fund and/or the Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund (hereafter collectively referred to as the "Southern

Funds"). To the extent that said plaintiffs were employees of employers which have permanently ceased to have an obligation to contribute to the Greater New York Funds, any named plaintiffs who are employees have ceased to accrue benefits thereunder. However, if said plaintiffs are, or may become, eligible to receive a benefit from one or more of the Greater New York Funds, they are participants in said fund or funds. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 7 of the complaint.

8. Defendants admit that the Greater New York Funds are jointly trusteed, multiemployer trust funds and employee benefit plans, and that the location of the principal offices of the Greater New York Funds is in the County and State of New York. The remaining allegations of paragraph 8 of the complaint concerning the applicability of certain statutory provisions cited therein constitute legal conclusions as to which no answer is required.

9. Defendants admit the allegations contained in paragraph 9 of the complaint.

10. Defendants deny the allegations contained in paragraph 10 of the complaint.

11. Defendants admit that the Greater New York Funds are administered within this judicial district. The allegations of paragraph 11 of the complaint concerning the applicability of statutory provisions cited therein constitute legal conclusions as to which no answer is required. Defendants deny the remaining allegations contained in paragraph 11 of the complaint.

12. Defendants admit that plaintiff Employers were members of the Greater New York Health Care Facilities Association, Inc. (the "Association") and were parties to the collective bargaining agreements between the Asso-

ciation and Local 144, Hotel, Hospital, Nursing Home & Allied Services Union, SEIU, AFL-CIO ("Local 144"). Defendants further admit that the aforesaid plaintiffs were contractually obliged to contribute, and made some contributions to the Greater New York Funds. Defendants deny that aforesaid plaintiffs made all contributions for which they were contractually obliged, and deny the remaining allegations contained in paragraph 12 of the complaint.

13. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 13 of the complaint.

14. Defendants admit that plaintiff Employers were contractually obliged and made some, but not necessarily all, required contributions to the Greater New York Funds. Defendants deny all remaining allegations contained in paragraph 14 of the complaint.

15. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 15-20 of the complaint. To the extent that those paragraphs purport to describe, summarize or reproduce any provisions or requirements of that collective bargaining agreement, said agreement will speak for itself.

16. Defendants admit that they have not transferred any portion of the corpus of the Greater New York Funds to the Southern Funds or to any plaintiff hereto because they are not entitled to it. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first, second and third sentences of paragraph 21 of the complaint. Defendants deny the remaining allegations contained in paragraph 21 of the complaint.

17. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allega-

tions contained in the first sentence of paragraph 22 of the complaint. Defendants deny the remaining allegations contained in paragraph 22 of the complaint.

18. Defendants admit that certain entities named as plaintiff employers and or management companies ceased making contributions to the Greater New York Funds. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 23 of the complaint.

19. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 24 of the complaint.

20. To the extent that certain plaintiffs were employees of employers which have permanently ceased to have an obligation to contribute to the Greater New York Funds, any named plaintiffs who are employees have ceased to accrue benefits thereunder. However, if said plaintiffs are, or may become, eligible to receive a benefit from one or more of the Greater New York Funds, they are participants in said fund or funds. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 25 of the complaint.

21. In response to paragraph 26 of the complaint, defendants incorporate by reference their answers to paragraphs 1-25 of the complaint as if fully set forth herein.

22. Defendants admit that the Greater New York Funds are jointly trusteed funds established for the employees of employers who contribute thereto. Defendants are without knowledge or information sufficient to form a belief as to the allegations of paragraph 27 concerning the purpose of the Southern Funds. Defendants deny the remaining allegations contained in paragraph 27 of the complaint.

23. Defendants deny the allegations contained in paragraph 28 of the complaint.

24. Defendants are without knowledge or information sufficient to form a belief as to the allegations of paragraph 29 of the complaint, except that the defendants admit that the Greater New York Funds provides benefits to plaintiff employees and other similarly situated employees who are entitled to them.

25. Defendants admit that Greater New York Funds maintain reasonable reserves. Defendants are without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 30 of the complaint.

26. Defendants admit they have not transferred any portion of the corpus of the Greater New York Funds to the Southern Funds or to any plaintiff hereto, because they are not entitled to such funds. Defendants deny the remaining allegations contained in paragraph 31 of the complaint.

27. Defendants deny the allegations contained in paragraph 32 of the complaint.

28. Defendants admit that paragraph 33 seeks relief against certain of the defendants, but denies the allegations contained therein.

29. In response to paragraph 34 of the complaint, defendants incorporate by reference their answers to paragraphs 1-25 and 27-31, as if fully set forth herein.

30. Defendants admit that certain of the defendants are trustees of the Greater New York Funds and administer those Funds solely in the interest of, and for the exclusive purpose of providing benefits to, the participants and beneficiaries of said Funds. The remaining allegations of paragraph 35 concerning the applicability of

certain statutory provisions cited therein constitute legal conclusions as to which no answer is required.

31. Defendants deny the allegations contained in paragraphs 36-38 of the complaint.

32. Defendants admit that paragraph 39 seeks relief against certain of the defendants, but deny the allegations contained therein.

33. In response to paragraph 40 of the complaint, defendants incorporate by reference their answers to paragraphs 1-25, 27-31 and 35-37, as if fully set forth herein.

34. Defendants admit that the Greater New York Funds are jointly trusteed multiemployer plans. Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the Southern Funds. The remaining allegations of paragraph 41 of the complaint concerning the applicability of certain statutory provisions constitute legal conclusions as to which no answer is required.

35. Defendants deny the allegations of paragraphs 42-43 of the complaint.

36. Defendants admit that they have not transferred any portion of the corpus of the Greater New York Funds to the Southern Funds or to any plaintiff hereto, because they are not entitled to such funds. Defendants deny the remaining allegations contained in paragraph 44 of the complaint.

37. Defendants deny the allegation of paragraph 45 of the complaint.

38. Defendants deny all allegations of the complaint to the extent not heretofore admitted, denied, or otherwise responsively pleaded.

39. Defendants deny that plaintiffs are entitled to any of the relief demanded in paragraphs (1)-(4) of the WHEREFORE clause of the complaint.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

This Court has no jurisdiction over the subject matter of this action.

SECOND AFFIRMATIVE DEFENSE

The complaint fails to state a claim against the defendants upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE

Plaintiffs who are trustees of the Southern Funds and plaintiffs who are denoted in the complaint to be the "plaintiff Employers and/or management companies" lack standing to assert the First and Second Claims for Relief in this action.

FOURTH AFFIRMATIVE DEFENSE

All of the plaintiffs lack standing to assert the Third Claim for Relief in this action.

FIFTH AFFIRMATIVE DEFENSE

The transfer of assets from the Local 144 Nursing Home Pension Fund sought by plaintiffs in this action is barred by Federal statute.

SIXTH AFFIRMATIVE DEFENSE

None of the defendants has any financial or other obligation to plaintiffs except to the extent that plaintiffs may be entitled to benefits as participants of the Greater New York Funds.

SEVENTH AFFIRMATIVE DEFENSE

Any loss or losses allegedly suffered by any of the plaintiffs were not caused by the defendants, or by anyone for whom any of the defendants is responsible, but instead by the plaintiffs and/or their agents.

EIGHTH AFFIRMATIVE DEFENSE

This action is barred by the equitable doctrines of laches, estoppel and waiver.

NINTH AFFIRMATIVE DEFENSE

This action is barred by the applicable statutes of limitations.

TENTH AFFIRMATIVE DEFENSE

At all times complained of herein, all conduct of the defendants was reasonable, lawful, and in good faith.

FIRST COUNTERCLAIM

1. This counterclaim is brought by the defendants Greater New York Funds against the plaintiffs American Nursing Home, Bruckner Nursing Home, Williamsburg Manor Nursing Home, Clearview Nursing Home, Seacrest Nursing Home, Shoreview Nursing Home, Clove Lakes Nursing Home, Fieldston Lodge Nursing Home, Freidwald House HRF, and Lyden Nursing Home (the "Employer Nursing Homes"), and B.N.H. Management Associates, Inc., Wald Management Associates, Inc. and 801 190th Street Management Associates, Inc. (the "Management Companies"), to the extent any of the Management Companies are asserted or deemed to be responsible for any of the obligations of any of the Employer Nursing Homes for delinquent contributions which, pursuant to 29 U.S.C. § 1145, said Employer Nursing Homes were required to make to the Greater New York Funds pursuant to the terms of the plan instruments, trust agreements, collective bargaining agreements and other instruments ("plan documents") under which the funds were established and are operated. This Court has jurisdiction of this counterclaim under 29 U.S.C. § 1132(e) and 29 U.S.C. § 185.

2. The Greater New York Funds are, as alleged in paragraph 3 of the complaint, jointly-trusteed labor-management, multiemployer trust funds and employer benefit plans.

3. The Employer Nursing Homes and Management Companies were obligated to make contributions to the Greater New York Funds under the terms of the applicable plan documents.

4. As of September 30, 1985, the Employer Nursing Homes and Management Companies have failed to make substantial contributions to the Greater New York Funds and are delinquent in making such contributions to the Local 144 Nursing Home Pension Fund and the New York City Nursing Home—Local 144 Welfare Fund as have been determined and confirmed to be delinquent by an audit of employer records, and further are delinquent in making contributions to the Local 144 Health Facilities Training and Upgrading Fund. In the aggregate, the Employer Nursing Homes and Management Companies have failed to make over $1 million in contributions to the Greater New York Funds which the Employer Nursing Homes and Management Companies were obliged to make through September 30, 1985.

5. Pursuant to 29 U.S.C. § 1132(g)(2), the Greater New York Funds are entitled to: (A) the unpaid contributions; (B) interest on the unpaid contributions; (C) an amount equal to the greater of such interest or liquidated damages computed as specified in 29 U.S.C. § 1132(g)(2)(C)(ii); (D) reasonable attorneys' fees and the costs of the action; and (E) such other legal or equitable relief as the Court deems appropriate.

6. Pursuant to the terms of the plan documents, the Greater New York Funds should be awarded the costs of audits of the Employer Nursing Homes and 12 percent interest on the delinquent contributions.

SECOND COUNTERCLAIM

1. This counterclaim is brought by the defendants Greater New York Funds against the plaintiffs Fort Tryon Nursing Home ("Fort Tryon") and Franklin Nursing Home ("Franklin") for an order requiring said plaintiffs to allow the defendants to examine Fort Tryon's and Franklin's records to determine the amounts of unpaid contributions due and owing from them to the defendants Greater New York Funds. This Court has jurisdiction of thls counterclaim under 29 U.S.C. § 1132(e) and 29 U.S.C. § 185.

2. The Greater New York Funds are, as alleged in paragraph 3 of the complaint, jointly-trusteed labor-management, multiemployer trust funds and employee benefit plans.

3. The plaintiffs Fort Tryon Nursing Home and Franklin Nursing Home were required to make contributions to the defendants Greater New York Funds and are otherwise obligated to the terms of the plan documents under which the defendant Funds were established and are operated.

4. Under the said plan documents, the defendant Funds and their Trustees have the right to examine records of Fort Tryon and Franklin to determine the amounts of unpaid contributions due and owing from them to defendant Funds.

5. Pursuant to said plan documents, the defendant Funds attempted to examine the records of Fort Tryon and Franklin who have refused to allow such examinations.

6. Pursuant to the plan documents, 29 U.S.C. § 1132 (a)(3), and 29 U.S.C. § 1132(g), the Greater New York Funds asserted in the Second Counterclaim of their Answer to the Second Amended Complaint that they were entitled to (A) an order requiring Fort Tryon and Franklin to cooperate in good faith with an examination

of their records by the defendant Greater New York Funds; (B) reimbursement for the expense of such audits; (C) the unpaid contributions; (D) 12 percent interest on the unpaid contributions; (E) an additional amount equal to the greater of such interest or liquidated damages computed as specified in 29 U.S.C. § 1132; (F) reasonable attorneys' fees and the costs of this action; and (G) such other legal or equitable relief as the court deems appropriate.

7. Plaintiffs defaulted in response to the defendants' Second Counterclaim.

8. Following plaintiffs' default, Greater New York Funds audited the records of Fort Tryon and Franklin and concluded that those employers have failed to make all required contributions.

9. Pursuant to the plan documents, 29 U.S.C. § 1132 (a)(3), and 29 U.S.C. § 1132(g), the Greater New York Funds are now entitled to (A) reimbursement for the expense of the aforementioned audits; (B) the unpaid contributions; (C) 12 percent interest on the unpaid contributions; (D) an additional amount equal to the greater of such interest or liquidated damages computed as specified in 29 U.S.C. § 1132;(E) reasonable attorneys' fees and the costs of this action; and (F) such other legal or equitable relief as the court deems appropriate.

WHEREFORE, the defendants respectfully submit that this Court should (1) dismiss the plaintiffs' third amended complaint in its entirety, (2) should enter judgment in the defendants' favor on their first counterclaim against the plaintiff Employer Nursing Homes for delinquent contributions, and award the Greater New York Funds the unpaid contributions, 12 percent interest thereon, the greater of such interest or liquidated damages computed pursuant to 29 U.S.C. § 1132(g)(2)(C)(ii), costs of the audits, costs and attorneys' fees, and

such other relief as this Court deems appropriate, and (3) should enter judgment in the defendants' favor on their second counterclaim against plaintiffs Fort Tryon and Franklin, awarding the Greater New York Funds the unpaid contributions, 12 percent interest thereon, the greater of such interest or liquidated damages computed pursuant to 29 U.S.C. § 1132(g)(2)(C)(ii), costs of the audits of Fort Tryon and Franklin, costs and attorneys' fees, and such other relief as this Court deems appropriate.

Dated: December 18, 1986

Respectfully submitted,

EPSTEIN BECKER BORSODY
& GREEN, P.C.

By: /s/ Henry Rose
HENRY ROSE
250 Park Avenue
New York, New York 10177-0077
(212) 370-9800
1140 19th Street, N.W.
Suite 900
Washington, D.C. 20036
(202) 861-1874

By: /s/ Harry N. Turk
HARRY N. TURK
250 Park Avenue
New York, New York 10177-0077
(212) 370-9800

Attorneys for Defendants

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT

PLEASE TAKE NOTICE that upon the third amended complaint herein; the annexed Statement Pursuant to Local Rule 3(g); the annexed Plaintiffs' First Request for Admission of Facts and Defendants' Admission thereto; the accompanying Memorandum of Law in Support of Plaintiff's Motion for Partial Summary Judgment; the supporting affidavit of Jonathan L. Sulds, Esq.; and the other papers and proceedings heretofore had herein, plaintiffs pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, will move this Court before the Honorable John E. Sprizzo, U.S.D.J., in Room 129, United States Courthouse, Foley Square, New York, New York 10007, on the 25th day of September, 1987, at 10:00 A.M., or as soon thereafter as counsel can be heard, for partial summary judgment ordering and directing defendants to account to the plaintiffs for all transactions by, and all assets and liabilities of the defendant Local 144, Nursing Home Pension Fund and the New York City Nursing Home—Local 144 Welfare Fund ("Greater Funds"); ordering and directing defendants to transfer to the Local 144—Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Funds") that sum of money which the Court shall determine represents the portion of the Greater Funds' reserves attributable to contribu-

tions made by the plaintiff Employers and/or Management Companies and as to which the Southern Funds have assumed the corresponding liabilities plus interest thereon; enjoining and restraining defendant trustees from continuing to administer the Greater Funds in a discriminatory manner; declaring that defendant trustees breached their fiduciary obligation to plaintiff employees under 29 U.S.C. § 1104(a)(1)(A) by so administering the Greater Funds; declaring that defendant trustees also breached their fiduciary obligation to plaintiff employees under 29 U.S.C. § 1104(a)(1)(D) by administering the plan in accordance with an instrument inconsistent with the requirements of 29 U.S.C. § 1414; ordering and directing defendant trustees to adopt asset transfer rules in compliance with 29 U.S.C. § 1414; and granting such other and further relief as may be just and proper.

Dated: New York, New York
April 10, 1987

Yours, etc.

GIBSON, DUNN & CRUTCHER

By: /s/ Jonathan L. Sulds
JONATHAN L. SULDS
9 West 57th Street
New York, New York 10019
(212) 906-7900
Attorneys for Plaintiffs

Plaintiffs' Statement Pursuant to Local Rule 3(g)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

STATEMENT PURSUANT TO LOCAL RULE 3(g)

Plaintiffs, by their attorneys Gibson, Dunn & Crutcher, in support of their motion for partial summary judgment, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, as to defendants' liability on all three of their causes of action, state the following facts as to which there are no genuine issues to be tried:

1. The Local 144-Nursing Home Pension Fund and the New York City Nursing Home-Local 144 Welfare Fund ("Greater Funds") are, and at all times material hereto were, jointly trusted, multiemployer trust funds, and multiemployer benefit plans. (Answer ¶ 8.)

2. The Local 144-Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Funds") are, and at all times material hereto were, jointly trusteed multiemployer trust funds and multiemployer benefit plans. (Complaint ¶ 2.)

3. In accordance with their collective bargaining agreements with Local 144, Hotel, Hospital, Nursing Home & Allied Service Employees Union, SEIU, AFL-CIO ("Local 144"), the plaintiff Employers and Management Companies (as defined in the Third Amended Complaint) made contributions at various times relevant hereto to the Greater Funds on behalf of their covered employees including the plaintiff Employees ("Employees"). (Sulds Affidavit ¶¶ 3-4, 10; Answer ¶¶ 12 & 14.)

4. The Greater Funds possess reserves that are derived, in part, from contributions received from the Employers and or Management Companies on behalf of their employees, including the plaintiff Employees. (Answer ¶ 25; Admission ¶ 2.)

5. On or about December 1, 1985, the Greater Welfare Fund ceased providing welfare coverage to the employees of the Employers and Management Companies including the plaintiff Employees. (Admission ¶ 3.)

6. On or about July 1, 1984, the Greater Pension Fund ceased accruing pension service credits for the employees of the Employers and Management Companies including the plaintiff Employees. (Admission ¶ 4.)

7. The Greater Funds' reserves are not now being used nor will they be used, to pay or provide benefits, or to produce income that may be used to pay or provide benefits to or for the employees of the Employers and Management Companies including the plaintiff Employees. (Admission ¶ 5.)

8. The Greater Funds have not made a transfer to the Southern Funds of any portion of their reserves. (Answer ¶¶ 16 26, 36.)

9. The transfer of the Employees' pension and welfare coverage from the Greater Funds to the Southern Funds resulted solely from the individual collective bargaining agreements negotiated between Local 144 and the Employers and Management Companies. (Sulds Affidavit ¶¶ 5-9.)

10. Neither the Greater Pension Fund nor the Greater Welfare Fund has adopted asset transfer rules in accordance with 29 U.S.C. § 1414 as part of its governing plan document or instrument. (Admission ¶¶ 6-7.)

11. The defendant trustees of the Greater Funds have administered those multiemployer benefit plans in accordance with the governing document or instrument

which does not contain asset transfer rules. (Admission ¶¶ 6-7.)

12. On or about December 1, 1985, the Southern Welfare Fund assumed the obligation to provide welfare coverage, in accordance with the terms of its trust agreement and plan document, to the employees of the Employers and Management Companies including plaintiff Employees. (Sulds Affidavit ¶ 15.)

13. On or about December 1, 1985, the Southern Pension Fund assumed the obligation to accrue pension service credits and pay pension benefits, in accordance with terms of its trust agreement and plan document, to the employees of the Employers and Management Companies including the plaintiff Employees. (Sulds Affidavit ¶ 15.)

14. On or about November 5, 1985, the Southern Pension Fund agreed to recognize fully all years of credited service earned under the Greater Pension Fund by those employees of the Employers and Management Companies who did not vest under the Greater Pension Fund prior to the transfer of their coverage to the Southern Pension Fund. (Sulds Affidavit ¶ 13.)

15. On or about November 5, 1985, the Southern Pension Fund agreed to recognize, for purposes of future accruals of credited service, the years of credited service earned under the Greater Pension Fund by those employees of the Employers and Management Companies who vested under the Greater Pension Fund prior to the transfer of their coverage to the Southern Pension Fund and on the basis thereof to pay a pro rata share of such employees' ultimate pension benefit based upon a ratio of their years of credited service under the Southern Pension Fund to their total years of credited service under both the Greater and Southern Pension Funds. (Sulds Affidavit ¶ 14.)

16. The plaintiffs have been unable to effectuate a transfer of any portion of the Greater Funds' reserves

to the Southern Funds in connection with the Southern Funds assumption of certain liabilities of the Greater Funds because of the defendants failure to adopt asset transfer rules in accordance with 29 U.S.C. § 1414. (Sulds Affidavit ¶ 16; Admission ¶¶ 6-7.)

DATED: New York, New York
April 10, 1987

Yours, etc.

GIBSON, DUNN & CRUTCHER

By: /s/ Jonathan L. Sulds
JONATHAN L. SULDS
9 West 57th Street
New York, New York 10019
(212) 906-7900
Attorneys for Plaintiffs

Of Counsel:

Jonathan L. Sulds
David J. Reilly

Plaintiffs' First Request for Admission of Facts and Defendants' Admission Thereto

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

PLAINTIFFS' FIRST REQUEST FOR ADMISSION OF FACTS

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, plaintiffs request that defendants within 30 days after service of this request admit or deny, for purposes of this action only, the truth of the following facts:

1. The reserves of the Local 144, Nursing Home Pension Fund and the New York City Nursing Home—Local 144 Welfare Fund (hereinafter collectively referred to as the "Greater Funds") referred to in Paragraph 25 of the defendants' Answer to the Third Amended Complaint ("Answer"), are derived from the contributions of contributing employers and/or the income therefrom.

2. The reserves of the Greater Funds referred to in paragraph 25 of the Answer are derived, in part, from contributions received from the plaintiff Employers and/or Management Companies on behalf of their participant employees and/or the income therefrom.

3. On or about December 1, 1985, the Greater Welfare Fund ceased providing welfare coverage to the employee participants of the plaintiff Employers and/or Management Companies.

4. The employee participants of the plaintiff Employers and or Management Companies did not accrue pension credits under the Greater New York Pension Fund during the period April 1, 1984 through May 15, 1984 and ceased accruing such pension credits on or about July 1, 1984.

5. The reserves of the Greater Funds referred to in paragraph 25 of the Answer are not now being used to pay or provide benefits, or to produce income that may be used to pay or provide benefits, to or for employees of the plaintiff Employers and or Management Companies, who previously were paid or provided benefits by the Greater Funds.

6. The Greater Welfare Fund has not adopted asset-transfer rules under 29 U.S.C. § 1414.

7. The Greater Pension Fund has not adopted asset-transfer rules under 29 U.S.C. § 1414.

Dated: New York, New York
February 11, 1987

GIBSON, DUNN & CRUTCHER

By: /s/ David J. Reilly
DAVID J. REILLY
9 West 57th Street
New York, New York 10019
(212) 906-7900

Attorneys for Plaintiffs,
Counterclaim Defendants

EPSTEIN BECKER BORSODY & GREEN, P.C.
Attorneys at Law
1140 19th Street, N.W.
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(202) 861-0900

March 19, 1987

David J. Reilly, Esq.
Gibson, Dunn & Crutcher
9 West 57th Street
New York, New York 10019

Re: Nicholas Demisay, et al. v. Local 144 Nursing Home Pension Fund, et al., 85 Civ. 6133 (JES)

Dear David:

Without admitting the relevance of the admissions to the referenced action, this is to advise you that the statements in Plaintiffs' First Request for Admission of Facts are admitted.

Sincerely,

/s/ Henry Rose
HENRY ROSE

HR:cb

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JONATHAN L. SULDS, being duly sworn deposes and says:

1. I am a member of the firm of Gibson, Dunn & Crutcher, attorneys for the plaintiffs in this action, and I make this affidavit in support of the plaintiffs' motion for partial summary judgment, on personal knowledge.

2. The plaintiffs in this action include: the management trustees of the Local 144—Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Management Trustees"); the present or former employers of those employees who are now participants in the Southern Funds and who are or were participants in the Local 144—Nursing Home Pension Fund and the New York City Nursing Home—Local 144 Welfare Fund ("Employers" or "Management Companies"); and the named employees of the Employers and Management Companies ("Employees").

3. Until in or about 1981, the Employers were all members of the Greater New York Health Care Facilities Association, Inc. ("Greater New York")—a multi-employer bargaining association—and thereby were parties

to the collective bargaining agreements between Greater New York and Local 144, Hotel, Hospital, Nursing Home and Allied Service Employees Union, SEIU, AFL-CIO ("Local 144"). Under those agreements, the Employers were contractually obliged to contribute, and did contribute to the Greater Funds on behalf of all of their employees covered by those agreements, including plaintiff Employees.

4. Upon withdrawing from Greater New York in or about 1981, the Employers negotiated and executed individual collective bargaining agreements with Local 144. Until November of 1984, each Employer, pursuant to its individual collective bargaining agreement with Local 144, was contractually obliged to, and did contribute to the Greater Funds on behalf of all of their employees covered by those agreements, including plaintiff Employees.

5. In or about February 1984, B.N.H. Management Associates, Inc. ("B.N.H.") and the other Employers each entered into negotiations with Local 144 for new individual collective bargaining agreements. One of the key goals that each of these employers sought to accomplish, and which they ultimately achieved in these negotiations, was the establishment of their own employee pension and welfare funds—the Southern Funds

6. As the principal spokesperson for each employer in these 1984 negotiations, I had numerous discussions with both Peter Ottley, Local 144 President, and counsel for Local 144, regarding the establishment of the Southern Funds. We spoke at length concerning the actuarial soundness of the proposed Southern Funds, including the necessity for fund reserves. In this regard, I advised Mr. Ottley and counsel on several occasions that it was my belief that once the Southern Funds became operational, the Greater Funds would be obligated to transfer to the Southern Funds that portion of its reserves attributable to contributions made by the Employers and B.N.H. All of us recognized that the Greater Funds possessed such reserves as they were then, and continue to be, substan-

tially overfunded. As to the basis for the transfer of a share of these reserves to the Southern Funds, I specifically explained that it was compelled by LMRA Section 302(c)(5), which provides that an employer's contributions to a jointly trusteed employee benefit fund must be used for the sole and exclusive benefit of the employees of such employer. I referred Mr. Ottley and counsel to *Local 50, Bakery & Confectionery Workers Union, Welfare Fund v. Local 3, Bakery & Confectionery Workers Union, Welfare Fund*, 773 F.2d 229 (2d Cir. 1984), a case in which the Second Circuit on facts very similar to this case compelled such a transfer between benefit funds pursuant to Section 302(c)(5) and (e).

7. On this basis, the parties agreed, pursuant to the collective bargaining agreements they executed on November 30, 1984, to establish the Southern Funds. (A copy of one such collective bargaining agreement containing the identical "Southern Funds Section" appearing in each agreement is attached hereto as Exhibit A.) More particularly, in each of these collective bargaining agreements, Local 144 expressly consented to the bringing of this action in the event that the Greater Funds refused to make a voluntary *pro rata* transfer of its reserves to the Southern Funds. Specifically, Southern Funds Section provides in relevant part:

Litigation

> It is understood that members of Southern [New York Residential Health Care Facilities Association, Inc. ("Southern New York") (*i.e.*, Employers and B.N.H. Management Associates, Inc.)] and authorized contributors may commence litigation against the Local 144—Greater New York Funds to obtain for the Local 144—Southern Pension, Local 144—Southern Welfare and Local 144—Southern Education Fund and Local 144—Southern Dental Account the portion of the corpus of each corresponding Local 144 Fund attributable to contributions of members of

Southern and authorized contributors, on the condition that upon receipt of such monies the Local 144—Southern Funds shall assume all liabilities of the Local 144—Greater New York Funds to employees of Southern members and/or authorized contributors. *The Union hereby agrees and acknowledges that members of Southern and/or authorized contributors may bring an action for partition and segregation of the Greater New York Fund reserves and the Union shall not oppose such litigation to the extent it is consistent with applicable law.*

8. Mr. Ottley also made clear on several occasions during the negotiations that it was absolutely critical to the establishment of the Southern Funds that Local 144 be assured that its members would receive the same level of benefits as provided by the Greater Funds. In addition, he wanted a commitment that employees whose coverage was to be transferred to the Southern Funds would lose nothing as a result thereof. For this reason, the Southern Funds Section of each agreement expressly requires that the Southern Funds grant benefit levels equal to those of the Greater Funds. This section further specifies:

> "There shall be a continuity of benefits for employees to be covered by the Local 144—Southern Funds who previously were covered by the Local 144—Greater New York Funds. No employees shall lose benefits as a result of transfer of his/her coverage from the Local 144—Greater New York Funds to the Local 144—Southern Funds."

9. This desire by Local 144 to prevent any disparity in the benefit levels of the Greater and Southern Funds also motivated its consent to the "Litigation" provision, quoted in Paragraph 7, *supra*, authorizing the commencement of this action. I had explained, and Mr. Ottley agreed, that the risk of the Southern Funds incurring a deficit and being forced thereby to reduce benefit levels

would be substantially reduced, if not eliminated, if the Southern Funds had available the reserves generated by the prior contributions paid to the Greater Funds on behalf of the Southern Funds' participants.

10. The Southern Funds Section also provides that each signatory employer shall continue to contribute the Greater Welfare Fund until the date two months prior to the operational date of the Southern Funds. (Exhibit A.) In accordance with this provision, the Employers and/or Management Companies made contributions to the Greater Welfare Fund on behalf of their covered employees, including the plaintiff Employees.

11. On or about October 18, 1985, valid and lawful trust agreements were executed establishing the Southern Funds. True and correct copies of those trust arrangements are attached hereto as Exhibits B and C.

12. On that same date, at a duly constituted meeting thereof, the board of trustees of the Southern Funds agreed that the Southern Funds would become operational on December 1, 1985. A true and correct copy of the minutes of this meeting is attached hereto as Exhibit D.

13. On or about November 5, 1985, the trustees of the Southern Funds, at a duly constituted meeting thereof, agreed that the Southern Pension Fund would fully recognize all years of credited service earned under the Greater Pension Fund by those participants who had not vested under the Greater Pension Fund prior to the transfer of coverage. Thus, for example, an employee with nine years credited service under the Greater Pension Fund who retires after participating in the Southern Pension Fund for one year is deemed vested under the Southern Pension Funds' ten-year service requirement and receives a monthly benefit from the Southern Pension Fund based on ten years of service. A true and correct copy of the minutes of this meeting is attached hereto as Exhibit E.

14. As to those employees who vested under the Greater Pension Fund before commencing participation in the Southern Funds, the Southern Pension Fund has agreed to provide a pro rata portion of their ultimate pension benefit. Such payment shall be based on a ratio of their number of years of service under the Southern Pension Fund to their total combined service credit under both the Greater and Southern Pension Funds. For example, an employee who retires with a total of twenty-five years of service, eight of which represent credited service under the Southern Pension Fund, shall receive eight/twenty-fifths of his/her total benefit from the Southern Pension Fund. (*See* Exhibit E.)

15. On December 1, 1985, the Southern Funds became operational, providing coverage to the approximate 1,981 employees of the plaintiff Employers and Management companies.

16. During the first fifteen months of the Southern Funds' operation, the problem that the Employers, Management Companies and Local 144 sought to guard against by recognizing the validity of a transfer of reserves from the Greater Funds to the Southern Funds—funding shortfalls and the attendant possibility of a reduction in benefits—has come to pass. Although the Southern Welfare Fund was established with a contribution rate actuarially computed to satisfy expenses, it has incurred costs in excess of the contributions paid to it. Thus, once the reserves with which this fund was established are exhausted, which has nearly occurred, it may be forced to reduce benefit levels or increase contribution rates, unless the Greater Funds satisfy their statutory obligations and make the requested transfer of a portion of their reserves to the Southern Funds.

/s/ Jonathan L. Sulds
JONATHAN L. SULDS

(Notarization Omitted in Printing)

Exhibit A—Representative Agreement between Local 144 and Southern Association Member, dated November 30, 1984

(omitted here but printed at p. 17)

Exhibit B—Local 144—Southern New York Residential Health Care Facilities Association Pension Fund Trust Agreement, dated October 18, 1985

(omitted here but printed at p. 49)

Exhibit C—Local 144—Southern New York Residential Health Care Facilities Association Welfare Fund Trust Agreement, dated October 18, 1985

(omitted here but printed at p. 76)

Exhibit D—Minutes of Trustees' Meeting of Southern New York Pension and Welfare Funds, dated October 18, 1985

(omitted here but printed at p. 103)

Exhibit E—Minutes of Trustees' Meeting of Southern New York Pension and Welfare Funds, dated November 5, 1985

(omitted here but printed at p. 106)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

STATEMENT PURSUANT TO LOCAL RULE 3(g)

Defendants, by their attorneys Epstein Becker Barsody & Green, in support of their motion for summary judgment pursuant to Rule 56(b) of the Federal Rules of Civil Procedure on all of plaintiffs' causes of action, state the following facts as to which there are no genuine issues to be tried:

1. Provisions of trust documents governing the New York City Nursing Home Local 144 Welfare Fund, the Local 144 Nursing Home Pension Fund, and the Local 144 Health Facilities Training And Upgrading Fund ("Greater New York Funds") require that Fund assets be used only to pay benefits to which employees are entitled under the terms of the applicable welfare or pension benefit plan. Exhibit A, Affidavit of Neil Fiddleman ("Fiddleman Affidavit"), dated June 8, 1987.

2. No instance of payment by any of the Greater New York Funds to an employer upon withdrawal from participation has been identified. Exhibit C, Affidavit of A. H. Higgs, Jr. ("Higgs Affidavit"), dated June 8, 1987, at 7.

3. Plaintiff Employers were obligated by collective bargaining agreements to contribute to the Greater New York Funds certain percentages of the wages earned by their employees in work covered by the Greater New York Funds until November, 1984. Exhibit B, Affidavit

of Peter Ottley ("Ottley Affidavit"), dated June 8, 1987, Attachments I and II at 21-28; Affidavit of Jonathan Sulds ("Sulds Affidavit"), submitted by Plaintiffs, dated April 10, 1987, at 2.

4. Contribution rates to the Funds were not affected by the actual value of benefits provided to the employees of a particular employer. Exhibit C, Higgs Affidavit at 1-2.

5. The Greater New York Funds have not attempted to determine the value of benefits provided to the employees of any employer. Exhibit D, Affidavit of William Boseski ("Boseski Affidavit"), dated June 8, 1987, at 2.

6. In negotiations between plaintiff employers and Local 144 leading to the collective bargaining agreements executed on November 30, 1984, Local 144's President and chief negotiator, Peter Ottley, did not agree that the funding necessary to allow proposed new funds ("Southern Funds") to provide benefits equal to those provided under the Greater New York Funds would be reliant on, or contingent to, Southern Employer efforts to obtain assets from the Greater New York Funds. Ottley Affidavit, p. 3-5.

7. The plaintiff Employers made a direct contractual commitment to guarantee that Southern employees would be held harmless from any lowering of benefits that would otherwise result from the Employers' withdrawal from the Greater New York Funds and the creation of the new Southern Funds. Exhibit B, Ottley Affidavit at 2-5; Sulds Affidavit, Exhibit A.

8. Pursuant to terms of the November 30, 1984 contract, pension contributions by Southern Employers for the period beginning July 1, 1984 were to be placed in escrow for "the purpose of building reserves for the Local 144 Southern Funds" until the Southern Pension Fund came into operation. Two months of welfare payments were to be paid to an escrow account for the Southern

Welfare Fund while the Greater New York Welfare Fund was continuing to provide benefits, pursuant to plan provisions. Sulds Affidavit, Exhibit A; Fiddleman Affidavit, Attachment VI at 6-7.

9. The Greater New York Funds have taken no action to transfer Greater New York Funds liabilities to the Southern Funds. Plaintiffs Response to Defendants' First Set of Interrogatories and Request for Production of Documents No. 14.

10. No participant or beneficiary has lost benefits to which he was entitled under the Greater New York Funds. Plaintiffs' Response to Defendants' First Set of Interrogatories and Request for Production of Documents No. 10; Deposition of Yvonne Fernicola, 3/31/87 at p. 15; Deposition of Edward Wizner, 3/31/87 at p. 13; Deposition of Martha Mulligan, 3/31/87 at p. 20 and Deposition of Anita Harris, 3/31/87 at p. 17.

11. In addition, plaintiffs stated facts in its statement pursuant to Local 3(g) dated April 10, 1987, and except as noted in defendants' response, there are no genuine issues to be tried regarding those facts.

Dated: June 10, 1987
New York, New York

Respectfully submitted,

EPSTEIN BECKER BORSODY & GREEN, P.C.

By: /s/ Henry Rose
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250 Park Avenue
New York, New York 10177-0077
(212) 370-9800
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By: /s/ Harry N. Turk
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Attorneys for the Defendants
and Intervener

Defendants' Response to Plaintiffs' Statement Pursuant to Local Rule 3(g)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

RESPONSE TO PLAINTIFFS' STATEMENT PURSUANT TO LOCAL RULE 3(g)

Defendants, by their attorneys Epstein Becker Borsody & Green, in response to Plaintiffs' Statement Pursuant to Local Rule 3(g) in Support of Plaintiffs' Motion for Partial Summary Judgment dated April 10, 1987, state the material facts alleged by plaintiffs as to which there exist a genuine issue to be tried:

1. Plaintiffs' Statement No. 12. This statement refers to coverage in accordance with the terms of the Southern Welfare Fund plan document. In plaintiffs' Response dated February 10, 1987 to defendants' First Set of Interrogatories and Request for Production of Documents ("Interrogatory"), plaintiffs admit that no plan document then existed and no document has been supplied thereafter to defendants.

2. Plaintiffs' Statement No. 13. Contrary to the statement that the Southern Pension Fund assumed obligations in accordance with terms of its plan document, plaintiffs' Response to Defendants' Interrogatory No. 11 admits that no plan document then existed, and none has been supplied thereafter to defendants.

3. Plaintiffs' Statement No. 16. This statement contains an implicit statement of law, in that plaintiffs allege that the reason they have been unable to effectuate a transfer of any portion of the Greater New York Funds' assets to the Southern Funds is the failure of the Greater New York Funds to adopt asset transfer rules in accordance with 29 U.S.C. § 1414. As a matter of law, even if the Greater New York Funds were to adopt such asset transfer rules, which they are not required to do at this time, application of those rules would not result in the payment of assets from the Greater New York Funds to the Southern Funds.

Dated: June 10, 1987
New York, New York

Respectfully submitted,

EPSTEIN BECKER BORSODY & GREEN, P.C.

By: /s/ Henry Rose
HENRY ROSE,
250 Park Avenue
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(202) 861-0900

By: /s/ Harry N. Turk
HARRY N. TURK
250 Park Avenue
New York, New York 10177-0077
(212) 370-9800

Attorneys for Defendants
and Intervener

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

EXHIBITS

Exhibit A

Affidavit of Neil Fiddleman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Titile Omitted in Printing)

AFFIDAVIT OF NEIL FIDDLEMAN

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

NEIL FIDDLEMAN, being duly sworn, deposes and says:

1. I am the Fund Manager of the New York City Nursing Home—Local 144 Welfare Fund, the Local 144—Nursing Home Pension Fund, and the Local 144 Health Facilities Training and Upgrading Fund ("Greater New York Funds").

2. The attached documents, marked Attachments 1-3 respectively, are true and correct copies of the Trust Agreements establishing the Greater New York Funds: Agreement and Declaration of Trust dated June 26, 1958, establishing the New York City Nursing Home Local 144 Welfare Fund, Agreement and Declaration of Trust dated December 12, 1963, establishing the Local 144—Nursing Home Pension Fund, and Agreement and Declaration of Trust dated September 22, 1976, establishing the Local 144 Health Facilities Training and Upgrading Fund.

3. The attached documents marked Attachments 4 and 5 respectively are true and correct copies of the Amended and Restated Trust Agreements of the New York City Nursing Home—Local 144 Welfare Fund dated December 15, 1975 and the Local 144—Nursing Home Pension Fund, also dated December 15, 1975. These are the currently effective Trust Agreements for these Funds.

4. True and correct copies of the title page and pages 6-7 of Welfare Fund Group Insurance Plan booklet are attached as Attachment 6. The provisions on "Termination of Insurance" were in force in 1985 when a group of employers ceased to contribute to the Welfare fund.

5. A true and correct copy of the Local 144 Nursing Home Pension Pan, Amended through January 1, 1986, is attached as Attachment 7. The benefit formula, in particular the Reduced Pension provisions of Section 3.03 of this Plan, is unchanged from the previous Pension Plan.

/s/ Neil Fiddleman
NEIL FIDDLEMAN

(Notarization Omitted in Printing)

Exhibit IV

Amended Welfare Trust Agreement of New York City Nursing Home—Local 144 Welfare Fund, dated December 15, 1975

NEW YORK CITY NURSING HOME—
LOCAL 144 WELFARE FUND

AGREEMENT AND DECLARATION OF TRUST

AGREEMENT dated the 15th day of December, 1975, by, between and among John Kelley, Peter Ottley, Clarence Morgan, Moses Braunstein, Meyer Temkin and Dr. Lee Lichtman, constituting all of the Trustees of the New York City Nursing Home—Local 144 Welfare Fund (hereinafter referred to as the "Trustees"),

WITNESSETH

WHEREAS, by Agreement and Declaration of Trust dated as of June 26, 1958, Local 144, Hotel Front Service Employees' Union, AFL-CIO, Nursing Home Division (hereinafter referred to as the "Union"), the New York City Nursing Home Association, Inc., (hereinafter referred to as the "Association"), and Peter Ottley, Peter Byrne, Raymond McMichael, Robert Kaufmann and Howard Adler, the then Trustees, established a trust for the purpose of providing welfare benefits to employees of the Association's members who were represented by the Union which was thereafter amended from time to time; and

WHEREAS, the said Agreement and Declaration of Trust, as amended, provides that the same may be amended by unanimous vote of all the Trustees; and

WHEREAS, John Kelley, Peter Ottley, Clarance Morgan, Moses Braunstein, Meyer Temkin and Dr. Lee

Lichtman now constitute the Truste (sic) of the said New York City Nursing Home—Local 144 Welfare Fund; and

WHEREAS, the Trustees desire to further amend the Agreement and Declaration of Trust as hereinafter set forth,

NOW, THEREFORE, the Agreement and Declaration of Trust is hereby amended and restated to provide as follows:

ARTICLE I

DEFINITIONS

Section 1. EMPLOYER. The term "Employer" shall mean each Employer who (a) is a member of the Association whose employees are covered by any collective bargining agreement existing betwen the Union and the Association, and (b) is not a member of the Association but with whom the Union enters into a collective bargaining agreement. The term "Employer" shall also mean for the purpose of this Agreement, the Union and any affiliated Union or Fund so long as said Unions or said Funds make contributions to this Fund on the same basis as any other Employer, pursuant to acceptance by the Trustees.

Section 2. EMPLOYEE. The term "Employee" means any individual employed by an Employer.

Section 3. PARTICIPANT. "Participant" as used herein means any employee or former employee of any Employer who makes contributions in behalf of such employee or of any employee benefit plan maintained by the Union, or any member of former member of an employee organization who is or may become eligible to receive a benefit of any type from the employee benefit plan established by this Agreement, or whose beneficiaries may be eligible to receive such benefit.

Section 4. TRUSTEES. The term "Trustees" shall mean the Trustees designated, nominated and appointed

in accordance with this Agreement and Declaration of Trust and any successor Trustees designated in the manner provided herein.

Section 5. AGREEMENT AND DECLARATION OF TRUST. The terms "Agreement and Declaration of Trust" and "Trust" as used herein shall mean this instrument including any amendments hereto and modification hereof and the trust created hereunder.

Section 6. WELFARE PLAN. The term "Welfare Plan" as used herein means the Employee Benefit Plan, program, method and procedure for the payment by the Trustee of benefits from the Trust Fund, in accordance with such rules and regulations relating to eligibility requirements, including period of membership in the Union, amount and computation of benefits and the general administration and operation of the Fund as the Trustees may from time to time adopt and promulgate.

Section 7. CONTRIBUTIONS. The term "Contributions" as used herein shall mean the payments made to the Trustees by the Employers, whether under and pursuant to said collective bargaining or other written agreements for the purposes set forth in the Agreement and Declaration of Trust.

Section 8. WELFARE FUND. The term "Welfare Fund" shall mean the "New York City Nursing Home—Local 144 Welfare Fund".

Section 9. TRUST FUND. The term "Trust Fund" shall mean the contributions paid by the Employers, together with all income, increments, earnings and profits therefrom and all other assets, whether cash, credits, securities of any type, property or interest in property, and life insurance or annuity contract or contracts held in or forming a part of, the Welfare Fund.

Section 10. BENEFICIARY. The term "Beneficiary" means any person designated by a participant or by the

terms of the Welfare Plan who is or may be entitled to a benefit thereunder.

Setcion 11. INVESTMENT MANAGER. "Investment Manager" means any fiduciary other than a Trustee or named fiduciary who has the power to manage, acquire or dispose of any asset of the Plan, is a registered investment adviser or a bank as defined in the Investment Advisers Act of 1940 or an insurance company qualified to exercise said powers under the laws of more than one state of the United States and has acknowledged in writing that he is afiduciary with respect to the Plan.

ARTICLE II

NAME

This Trust Fund shall be known as the New York City Nursing Home—Local 144 Welfare Fund, and the Trustees shall conduct the business of the Trust and execute all agreements in that name.

ARTICLE III

PURPOSE OF THE TRUST

Section 1. The Trust and the Fund are created for the exclusive purpose of providing and maintaining hospitalizaiton, sick, disability and accident benefits, medical and surgical benefits, life insurance or death or other benefits as may be determined by the Trustees, for the benefit of the employees of the Employers, and if so determined by the Trustees, in whole or in part, group insurance for hospitalization, sick, disability and accident benefits, surgical and medical care or life insurance and death benefits for the families of such employees as defined by the Trustees, and for the purpose of defraying the reasonable expenses of administering the Trust and the Fund.

The Trustees may agree, with regard to any such policy or insurance, with the insurance carrier thereof,

upon waiting periods, definition of full-time employment and such other provisions concerning eligibility of employees as the Trustees may deem appropriate. Nothing herein shall be construed to restrict the Trustees, in securing benefits to the employees, to the purchase of insurance.

ARTICLE IV

APPROVAL OF GOVERNMENTAL AGENCIES

Section 1. The Welfare Plan established under this Agreement and Declaration of Trust shall be as qualifies under the Internal Revenue Code and the Employee Retirement Income Security Act of 1974, and qualifies for tax deductibility of the contributions made by Employers to the Trust Fund.

Section 2. The Trustees shall submit this Agreement and Declaration of Trust the Welfare Plan and such other information as it may be required to submit to the Internal Revenue Service for a ruling as to the qualifications of the Welfare Plan under the Internal Revenue Code, or to the Department of Labor, the Internal Revenue Service, and any other federal departments or agencies as may be necessary to comp with the provisions of the Employee Retirement Income Security Act of 1974. In making such submissions, the Trustees shall provide such data and make such representations on their behalf and on behalf of contribtuing Employers as may be required. In making such submissions, the Trustees shall engage the services of an actuary which has been enrolled by the Joint Board for the Enrollment of Actuaries established pursuant to the Employee Retirement Income Security Act of 1974.

ARTICLE V

CONTRIBUTIONS TO THE TRUST FUND

Section 1. The contributions of the Employers shall be made in accordance with the collective bargaining

agreements made by the Union, the Association and Employers on behalf of covered employees, and shall be paid to the Trustees at such regular intervals, in accordance with said collective bargaining agreements, and as the Trustees shall direct.

Section 2. Each Employer and the Union shall promptly furnish to the Trustees on demand such payroll records and data with respect to the individual employees benefiting from this Agreement that the Trustees may require in connection with the administration of the Trust and the policies; such information and data being limited in nature to such matters as name, classification, social security number and hours worked. The Trustees, or their authorized representatives, may examine the pertinent payroll record of each Employer with respect to individual employees benefiting from this Agreement whenever such examination is deemed the proper administration of the Trust.

Section 3. (a) In addition to all other remedies, if the Trustees, or any of them, shall complain that any Employer has not made full payment to the Trustees as required under the proivsions of any of the collective bargaining agreements, such complaint shall be handled in the same manner as provided for in the grievance and arbitration provisions contained in whatever collective bargaining agreement appiles.

(b) The Trustees likewise are hereby given the right, in their own names as Trustees, to institute or intervene in any proceeding at law, in equity, or in bankruptcy for the purpose of effectuating the collection of any sums due to them from any Employer under the provisions of the applicable collective bargaining agreemen (sic). The Trustees are hereby empowered to seek all damages, including but not limited to liquidated damages, interest at such rate as the Trustees shall from tim (sic) to time determine, and the costs and legal fees incurred by it in such proceeding, as are or may be due to the Fund.

ARTICLE VI

POWERS, DUTIES, EXPENSES AND FEES OF THE TRUSTEES

Section 1. The Trustees may, among other things:

(a) Accept and receive all contributions, income, monies and other property, and shall have the exclusive power to hold, invest, reinvest, manage administer same, subject to the limitations provided herein, for the uses, purposes and trusts herein provided, except to the extent that authority to manage, acquire or dispose of the assets of the Fund is delegated to one or more investment managers as hereinafter provided.

(b) Formulate, adopt and administer a Welfare Plan for the exclusive benefit of the covered employees in order to provide health and welfare benefits for the covered employees. Both the principal and income of the Trust Fund may be disbursed and distributed for the purposes set forth herein.

(c) Promulgate and establish rules and regulations for the administration and operation of the Welfare Plan in order to effectuate the purposes thereof.

(d) Establish as part of the Trust Fund such reserve or reserves as the Trustees shall in their opinion deem necessary or advisable for the sound and efficient administration of the Welfare Plan.

(e) Receive any securities or other property of any kind, nature or description, whatsoever that are tendered to them and that they deem to be acceptable.

(f) Enter into agreements, contracts and other instruments for the deposits of funds with banks, trust companies or other institutions whose deposits are insured by the Federal Deposit Insurance Corporation, which accept and hold monies on deposit, and to authorize such depository to act as custodian of the funds, whether in cash or securities or other property.

(g) The Trustees are empowered to enter into Agreements, contracts and other instruments for the deposit or investment of funds with banks and trust companies and to delegate to such banks and trust companies such power and authority as may be necessary to effectuate this purpose, as well as to authorize such depository to act as custodian of the funds, whether in cash, securities or other property. To provide for the administration of the Trust Fund, the Trustees in their discretion (but acting with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matter would use in the conduct of an enterprise of a like character and with like aims) (1) may appoint as investment manager an organization or entity which has the power to manage, acquire, or to dispose of any asset of a Plan as defined in the Employee Retirement Income Security Act of 1974 and which is (i) registered as an investment adviser under the Investment Advisers Act of 1940; (ii) a bank as defined in that Act or (iii) an insurance company qualified to perform these services under the law of more than one state of the United States, (2) may transfer to the investment manager all, or such part as they deem desirable, of the assets of the Fund, and (3) may enter into an agreement with the investment manager which shall be in such form and contain such provisions as the Trustees may deem appropriate and consistent with the provisions of the Employee Retirement Income Security Act of 1974, including but not limited to, provisions relating to delegating to the investment manager, authority to manage, acquire or dispose of the assets of the Fund trnasferred (sic) to it the acknowledgement by the investment manager it is a fiduciary with respect to the Plan formulated and adopted by the Trustees, the authority of the Trustees to amend the agreement with the investment manager, and the authority of the Trustees to settle the accounts of the investment manager on behalf of all persons having an interest in the Fund. Any such

appointment or agreement shall be subject to terminate by the Trustees upon thirty (30) days notice.

(h) Authorize withdrawals of monies from such account or accounts, but only by orders or checks signed by such of the Trustees as shall have been authorized in writing by the Trustees to sign the same.

(i) Invest and reinvest such funds of the Trust Fund as are not required for current expenditures in such securities as are legal for the investment of trust funds in the State of New York.

(j) Exercise all rights or privileges granted to the policy holder by provision of each policy or allowed by the insurance carrier of such policy and may agree with such insurance carrier to any alteration, modification or amendment of such policy and may take any action respecting such policy or the insurance provided thereunder, which may be necessary or advisable, and such insurance carrier shall not be required to inquire into the authority of the Trustees with regard to any dealings in connection with such policy. If the Trustees so agree with any insurance carrier or carriers of the policy or policies, the Trustees, or any one or more of them, or any person or persons designated by them, may pass upon the validity of claims for benefits under a policy or policies and, in payment of such claims in the amounts approved, may sign drafts upon the insurance carrier or carriers of such policy or policies.

Section 2. In addition to all other rights, powers and prerogatives vested in them, the Trustees may:

(a) Hold from time to time any or all of the Trust Fund in cash, uninvested and non-productive of interest or other income.

(b) Sell, transfer, or dispose of any securities or other property at any time held by them for cash or on credit; and convert, or exchange any securities or other property at any time held by them for other securities or property which the Trustees may deem acceptable, subject to the

limitation herein contained. Any such sale, transfer, disposition, conversion or exchange may be made publicly or by private arrangement.

(c) Consent to the reorganization, consolidation, merger, dissolution, or readjustment of the finances, of any corporation, company or Association, any of the securities of which may at any time be held hereunder, exercise any option or options, make any agreement or subscription, pay any expenses, assessments or subscriptions, in connection therewith and hold and retain any property acquired by means of the exercise of the powers expressed in this paragraph to the extent that it is acceptable to the Trustees.

(d) Compromise, arbitrate, settle, adjust or release any suit or legal proceeding, claim, debt, damage or undertaking due or owing to the Trust Fund on such terms and conditions as the Trustees may deem advisable.

(e) Lease or purchase such premises, materials, supplies and equipment, and employ and retain such legal counsel, investment counsel, administrative, accounting, actuarial, clerical, custodial and other assistants or employees as in their discretion the Trustees may deem necessary or appropriate and to pay their reasonable expenses and compensation out of the Trust Fund.

(f) Vote in person or by proxy or otherwise upon securities held by the Trustees and to exercise by attorney or in any other manner any other rights of whatsoever nature pertaining to securities or any other property at any time held by them hereunder.

(g) Make, execute and deliver as Trustees any and all instruments in writing necessary or proper for effective exercise of any of the Trustees' powers as stated herein or otherwise necessary to accomplish the purposes of the Trust Fund and this Trust Agreement.

(h) Borrow money from any and all types of persons, companies or institutions upon such terms and conditions

as the Trustees may deem desirable and for the sums so borrowed or advanced, the Trustees may issue promissory notes or other evidence of indebtedness as Trustees, and secure the payment thereof by the pledge of any securities or other property in their possession as Trustees.

(i) Authorize by resolution any one or more of the Trustees to execute any notice or other instrument in writing and all persons, partnerships, corporations or associations may rely thereupon that such notice or instrument has been duly authorized and is binding on the Trust Fund and the Trustees.

(j) Do all other Acts, and take any and all other action, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder, and for the effectuation of the purposes of the Welfare Plan.

Section 3. The Trustees may delegate any of their ministerial powers or duties hereunder to any of their agents or employees, including one or more of the Trustees. The Trustees may appoint a Fund manager to perform administrative and such other duties as the Trustees may from time to time lawfully delegate. The Trustees may allocate responsibilities among themselves and designate persons other than Trustees to carry out fiduciary responsibilities as provided in this Agreement and Declaration of Trust. The power to allocate fiduciary responsibility shall not apply to the allocation of the power to manage and/or control the assets of the Fund and the Plan, other than the power to appoint an investment manager or mangers.

Section 4. The Trustees shall have and maintain an office in the City and County of New York, which shall be deemed the situs of the Trust Fund. The Trustees may from time to time change the location of said office within the City and County of New York, but no change shall be effective until notice thereof shall have been given to the Union, the Association and the other Employers.

Section 5. Notices given to the Trustees, the Union, the Association, or the Employers, shall, unless otherwise specified, be sufficient if in writing and delivered to, or sent by postpaid first class mail or prepaid telegram. Except as herein otherwise provided, distribution or delivery of any statement or document required hereunder to be made to the Trustees, Association, Union or Employers shall be sufficient if delivered in person or if sent by postpaid first class mail.

Section 6. The expenses incurred in the collection of contributions and in the administration and operation of the Trust Fund shall be paid from the Trust Fund. Insofar as practicable the Trustees shall utilize all facilities offered to them by the Union to collect Employer contributions.

Section 7. The Trustees may, in their sole discretion, enter into such reciprocity agreement or agreements with other funds as they determine to be in the best interests of the Fund, the participants and beneficiaries, provided that any such reciprocity agreement or agreements shall not be inconsistent with the terms of this Trust Agreement or the collective bargaining agreements under which this Trust Agreement is maintained.

Section 8. The Trustees shall have the power to merge with any other fund established for similar purposes as this Trust Fund under terms and conditions mutually agreeable to the respective Trustees.

Section 9. Any Trustee or fiduciary with respect to the Trust or Plan may receive such benefits as he may be entitled to as a participant. Any fiduciary with respect to the Trust or Plan may receive reimbursement of expenses properly and actually incurred in the performance of his duties with the Plan. Such reasonable expenses shall include the costs incurred in attendance at and participation in appropriate educational conferences held for fiduciaries and administrators of jointly man-

aged multi-employer benefit plans. However, no fiduciary shall receive compensation from the Plan other than for reimbursement of expenses actually and properly incurred.

ARTICLE VII

ACCOUNTS, RECORDS AND AUDITING THEREOF

Section 1. All income, recoveries, contributions, forfeitures and any and all monies, securities and properties of any kind at any time received or held by the Trustees hereunder shall be held for the uses and purposes hereof.

Section 2. The Trustees shall procure an audit of the books of the Trust by a certified public accountant as required by law not less frequently than once each year, and shall engage the services of an enrolled actuary for the purpose of preparing all actuarial information and actuarial valuations as required by law. A copy of this audit along with a Plan description, the bargaining agreement, Trust Agreement, contract or other instruments under which the Plan was established or is operated and all other reports and schedules required by law to be in the Annual Report to the Secretary of Labor shall be available for inspection by all authorized persons, including participants and beneficiaries. These reports shall be available in the principal office of the Fund and such other location, including those which may be prescribed by law, as is necessary to make available all pertinent information to all participants.

The Trustees shall furnish to each apreticipant (sic) covered under the Plan and to each beneficiary receiving benefits under the Plan a copy of the current Summary Plan description and Annual Report as required by law. Upon written request of a participant or beneficiary receiving Plan benefits and at a reasonable charge, the Trustees shall furnish any participant or beneficiary receiving benefits a copy of the updated Summary Plan description, Plan description, Annual Report, Trust

Agreement or other instruments related to the establishment or operation of the Plan.

Section 3. The Trustees shall have the right to request records from contributing Employers with respect to wages and employment and shall have the right to examine said wage and employment records through duly authorized representatives including certified public accountants.

Section 4. The Trustees shall furnish to an Employer after completion of an audit, pursuant to Article VII, Section 3 hereof, a written audit report. The Employer shall have fifteen (15) days from receipt of the report within which to request from the Trustees a conference to discuss the audit. The Employer shall pay any delinquent amount within thirty (30) days from the date of the conference with interest at the rate of six (6) per cent per annum from the date when payment was due.

Section 5. The expense of the first audit of an Employer's records whenever performed by the representatives of the Trustees, pursuant to Article VII, Section 3 hereof, shall be paid by the Trustees. If a second or subsequent audit is performed, pursuant to Article VII, Section 3 hereof, same shall be paid by the Trustee unless a delinquency is established in an amount in excess of $500.00, in which event the Trustees shall require the Employer to pay for the cost of the audit with interest on the delinquency at the rate of six (6) per cent per annum from the date payment was due.

ARTICLE VIII

CLAIMS AND INDIVIDUAL RIGHTS

Section 1. No Employer or employee, or any person claiming by or through such employee by reason of having been named a beneficiary, in a certificate or otherwise, shall have any rights, title or interest in or to the funds or other property of the Trust Fund or any part

thereof, except that employees shall have the right to such benefits as may specifically be provided by the Pension Plan and the applicable rules and regulations thereunder.

Section 2. No employee shall have the option to receive any part of the Employer's contribution instead of the benefits provided by the Fund, or to receive a cash consideration in lieu of such benefits, either upon the termination of the Trust or his withdrawal through severance of employment or otherwise, except as permitted by the Employee Retirement Income Security Act of 1974.

Section 3. No monies, property or equity of any nature whatsoever in the Trust or Trust Fund or benefits or monies payable therefrom shall be subject in any manner, by any employee or person claiming through such employee, to anticipation, alienation sale, transfer, assignment, pledge, encumbrance, garnishment, mortgage, lien or charity and any attempt to cause the same to be subject thereto shall be null and void.

Section 4. The assets of the Fund and of the Plan shall at no time inure to the benefit of any Employer. No claim for a refund or a contribution or other payment to the Fund shall be allowed except as permitted by law and then only upon the basis of such evidence as the Trustees may require.

ARTICLE IX

OBLIGATIONS AND LIABILITIES OF TRUSTEES AND OTHER PERSONS

Section 1. Each Trustee or other Plan Fiduciary shall exercise the powers of management and investment of the Trust assets granted to him under this instrument with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters

would use in the conduct of an enterprise of a like character and with like aims. Such prudent management shall include the diversification of investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to diversify such investments.

Section 2. A fiduciary with respect to the Plan shall not:

(a) deal with the assets of the Plan in his own interest or for his own account;

(b) act in any capacity in a transaction involving the Plan on behalf of a party whose interest are adverse to the interest of the Plan or its participants or beneficiaries;

(c) receive any consideration for his own account from any party dealing with the Plan-inconnection with a transaction involving Plan assets.

Section 3. Trustees or other fiduciaries are not liable in Trustee duties have been specifically assigned to a Co-Trustee for committing a breach of fiduciary responsibilities. Each Trustee shall be liable for a breach of fiduciary duty on the part of another Trustee if knowing of the breach of fiduciary responsibility, he participates in or undertakes to conceal an act or omission of such other Trustee or if with knowledge of a breach by another Trustee, he fails to make reasonable efforts to remedy the breach.

Section 4. If pursuant to this instrument a Trustee or other fiduciary allocates fiduciary responsibilities other than trustee responsibilities, the named fiduciary is not liable for the acts or omissions of the person designated to carry out such responsibilities, providing that the named fiduciary exercised the required degree of prudence, skill and care in making such allocation or desig-

nation. Trustee responsibilities for the purpose of this section are those responsibilities provided for in the Plan's trust instrument to manage or control the assets of a plan other than the power to appoint an investment manager.

Section 5. The Trustees shall not be liable either individually or as Trustees for any acts or omissions of a prudently appointed investment manager (unless they participate knowingly in, or knowingly undertake to conceal, such act or omission, knowing such act or omission to be a breach of the investment manager's fiduciary responsibility with respect to the Plan), and shall be under no obligation to invest or otherwise manage any assets of the Fund that is subject to the management of the investment manager.

Section 6. Each Trustee shall be protected in acting upon any paper or document believed to be genuine and to have been made, executed or delivered by the proper party purporting to have made, executed or delivered the same if it was reasonable and prudent under the circumstances to believe that such document was genuine and had been made, executed or delivered by the proper party.

Section 7. The Trustees shall not be bound by any notice, direction, requisition advice or request, unless and until it shall have been received by the Trustees at the principal place of business of the Trust Fund.

Section 8. No party dealing with the Trustees in relation to this Trust shall be obliged to see to the application of any money or property of the Trust, or to see that the terms of this Trust have been complied with, or be obliged to inquire into the necessity of expediency of any act of the Trustees, and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereof (1) that at the time of the delivery of said instrument the Trust hereby created was in full force and effect, (2) that the said instrument was executed in

accordance with the terms and conditions contained in the Trust Agreement, and (3) that the Trustees were duly authorized and empowered to execute such instrument.

Section 9. The costs and expenses (including counsel fees) of any action, suit or proceeding brought by or against the Trustees, or any of them, shall be paid from the Fund, except in the event that in such action, suit or proceeding it is adjudged that such Trustee or Trustees breached the fiduciary obligations set forth in the Employee Rëtirement Income Security Act of 1974.

ARTICLE X

APPOINTMENT, REMOVAL, VOTING, RESIGNATION AND ADMINISTRATIVE FUNCTIONS OF TRUSTEES

Section 1. There shall be eight (8) Trustees, four (4) of whom shall be designated as Union-appointed Trustees, and the other four (4) as Association-appointed Trustees by the Association acting on behalf of all contributing Employers. The above-named Trustees, each for himself, accept their appointment as Trustees and consent to act as Trustee hereunder, and declare and agree by virtue of the terms, conditions and provisions of this Trust Agreement and for the uses, purposes and trusts and with the powers and duties herein set forth and none other.

Section 2. Any vacancy in the Union-designated Truses shall be filled by appointment of the Executive Board of the Union and any vacancy in Association-designated Trustees shall be filled by appointment of the Association. No vacancy or vacancies in the office of Truste shall impair the power of the remaining Trustees, acting in the manner herein provided, to administer the affairs of this Trust.

Section 3. The Union and the Association may remove any of their respective appointees at any time provided

the party making such removal simultaneously appoints a succesor in his place.

Section 4. Three (3) Union-appointed Trustees and three (3) Association-appointed Trustees present in person at any meeting shall constitute a quorum for the transaction of business. Decisions of the Trustees shall be made by the concurring vote of a majority of the Union-appointed Trustees and a majority of the Association-appointed Trustees present representing their group.

Section 5. A Trustee may resign by giving a notice in writing to the remaining Trustees.

Section 6. The President and Secretary-Treasurer of the Union and the President of the Association shall by virtue of their offices be members of the Board of Trustees. The other Union-appointed Trustees shall be designated by the Executive Board of the Union. The Union-appointed Trustees, however, shall be subject to removal by the Executive Board of the Union.

Section 7. The Trustees shall serve until removed or until their successors are duly appointed and designated except that the President and Secretary-Treasurer of the Union and the President of the Association shall serve as long as they continue to hold their respective offices in either the Union or the Association.

Section 8. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Union or any successor to any of them, a successor Trustee shall be designated by the Union or any successor to any of them, a successor Trustee shall be designated by a resolution of the Executive Board of the Union, which shall be filed with the remaining trustees. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Association, his successor Trustee shall be designated in writing by the Presi-

dent of the Association which shall be filed with the remaining Trustees.

Section 9. The vote of the Trustees may be cast by them in person at a meeting or may be evidenced by written instruments signed by the required number of Trustees of the question to be decided.

Section 10. In the event the Trustees are unable to agree on action within seven days, the Trustees shall agree upon an impartial arbitrator to decide the matter or question in dispute and in the event of failure of the Trustees to agree upon an impartial arbitrator within seven days, any one of the Trustees may petition the American Arbitration Association for the appointment of an impartial arbitrator whose decision on the matter shall be final and binding.

Section 11. One of such Trustees shall be appointed by vote of the Trustees as Chairman of the Trust Fund and one of such Trustees shall be appointed as Secretary of the Trust Fund, but at all times one of those officers shall be a Union-appointed Trustee and the other shall be an Association-appointed Trustee.

Section 12. The Chairman or the Secretary or any three (3) Trustees may call a meeting of the Trustees at any time by giving at least five (5) days written notice of the time and place thereof to each Trustee. Meetings of the Trustees may also be held at any time without notice if all the Trustees consent thereto.

ARTICLE XI

TERMINATION OF THE TRUST

Section 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

(a) In the event the Trust Fund shll (sic) be, in the opinion of the Trustees, inadequate to carry out the intent and purpose of this Agreement, or to meet the payments

due or to become due under this Agreement or the Welfare Plan promulgated hereunder to persons already drawing benefits;

(b) In the event there are no individuals living who can qualify as participants or beneficiaries hereunder;

(c) In the event of termination as otherwise provided by law.

Section 2. In the event that this Trust shall terminate for any of the reasons set forth in Section 1 of this Article, the assets of the Trust Fund shall be allocated among the participants and beneficiaries of the Plan in the manner set forth in the Plan in full accordance with the law, after making provisions for payment by the Fund of any and all obligations of the Trust, including expenses preceding and incidental to the termination and after a final audit has been made.

ARTICLE XIII

BONDING AND INSURANCE

Section 1. Every fiduciary with respect to the Plan and every person who handles funds or other property of the Plan, except those exempted by the law, shall be bonded. Any individual designated by a Trustee to attend meetings of the Trustees and to act in his behalf in his absence shall also be bonded. The amount of such bond shall be fixed each year and shall be no less than 10 per cent of the amount of funds handled by the person, or class or persons covered by the bond, subject to the minimum and maximum limitations established by law. Such bond may not be procured from any surety or other company agent or broker in whose business operations such Plan or any party in interest has any direct or indirect control or significant financial interest. The cost of the premiums for such bonds shall be paid out of the Trust Fund.

Section 2. The Trustees may, in their discretion, obtain and maintain insurance policies, to the extent per-

mitted by law, to cover liability or losses to the Fund or the Plan occurring by reason of the act or omission of a Trustee or fiduciary, or any employee, agent or designee of them or of the Fund, while engaged in business for or on its behalf, provided that such insurance policy shall permit recourse against the Trustee or fiduciary as may be required by law. The cost of the premiums of such policies shall be paid out of the Fund.

Section 3. The Fund shall not pay premiums on any policy issued to indemnify any Trustee for recourse against him in his capacity as a fiduciary.

ARTICLE XIV

EXECUTION AND INTERPRETATION

Section 1. This Agreement and Declaration of Trust may be executed in one or more counterparts. The signature of a party on any counterpart shall be sufficient evidence of his execution hereof.

Section 2. This Trust is created and accepted in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts and transactions of the parties hereto shall be determined in accordance with the laws of the State of New York, except as preempted by the laws of the United States.

Section 3. The primary purpose of this Agreement and Declaration of Trust being to provide within the limits of the contributions provided for herein, a practical plan for benefits for employees, it is understood that the form of the Plan, and of this Agreement and Declaration of Trust, shall not give rise to a literal or formal interpretation or construction; such interpretation or construction shall be placed on this Agreement and Declaration of Trust, as will assist in the functioning of the Plan, for the benefit of employees, regardless of form.

Section 4. This Agreement and Declaration of Trust and the Plan established hereunder shall be deemed exclusively to define the powers, duties, rights and obligations of all persons in relation to the Trust Fund.

Section 5. Should any provision contained in this Agreement and Declaration of Trust, be deemed or held to be unlawful, such fact shall not adversely affect the other provisions herein and therein contained, unless such illegality shall make impossible or impractical the functioning of the ultimate plan; no Trustee or other party to this Agreement shall be held liable for any act done or performed in pursuance of any provision herein or therein contained (regardless of the fact that such provision may be held unlawful) prior to the time when such provision shall in fact be held to be unlawful by a court of competent jurisdiction.

Section 6. Wherever any words are used in this Agreement and Declaration of Trust in the masculine gender, they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and wherever any words are used in this Agreement and Declaration of Trust in the singular form they shall be construed as they were also used in the plural form in all situations where they would so apply, and wherever any words are used in this Agreement and Declaration of Trust in the plural form they shall be construed as though they were also used in the singular form in all situations where they would so apply.

ARTICLE XV

AMENDMENTS

The provisions of this Agreement and Declaration of Trust may be amended to any extent, and at any time, by an instrument in writing executed by the Association appointed Trustees and by the Union-appointed Trustees, provided that no amendment shall divert any of the Trust

Fund then in the hands of the Trustees (and already paid in by Employers to the Trustees) from the purposes of this Trust Fund. Provided further that no such amendment shall permit any return or payments over of any part of the then existing Trust Fund to any Employer. Any amendment must be such as will continue the Pension Fund's qualification under the Internal Revenue Code and will continue its qualification for tax deductibility of the contributions made by Employers to the Trust Fund. No amendment shall divert any of the Trust from the purposes of this Fund, nor shall there be any amendment as a result of which there shall not be an equal number of Employer Trustees and Union Trustees. No amendment shall reduce retroactively the benefits of any participant or beneficiary as of the time the amendment is adopted and no retroactive amendment shall reduce the accrued benefits of a participant or beneficiary as of the first plan year to which the amendment applies.

ARTICLE XVI

EFFECTIVE DATE

The effective date hereof shall be that of the execution of this Trust Agreement.

IN WITNESS WHEREOF, the parties have hereunto affixed their hands and seals this 15th day of December 1975.

/s/ Moses Brownstein (L.S.)	/s/ Peter Otley (L.S.)
/s/ Meyer Temkin (L.S.)	/s/ John Kelley (L.S.)
/s/ Lee Lichtman (L.S.)	/s/ Clarence Morgan (L.S.)

Exhibit A

Attachment V—Amended Pension Fund Trust Agreement of Local 144—Nursing Home Pension Fund, dated December 15, 1975

LOCAL 144—NUSING (sic) HOME PENSION FUND

AGREEMENT AND DECLARATION OF TRUST

AGREEMENT dated the 15th day of December, 1975, by, between and among John Kelley, Peter Ottley, Clarence Morgan, Moses Braunstein, Meyer Temkin and Dr. Lee Lichtman, constituting all of the Trustees of the Local 144—Nursing Home Pension Fund (hereinafter referred to as the "Trustees"),

WITNESSETH

WHEREAS, by Agreement and Declaration of Trust dated as of December 12, 1963, Local 144, Hotel and Allied Service Employees Union, AFL-CIO, (hereinafter referred to as the "Union"), the Metropolitan New York Nursing Home Association, Inc. (hereinafter referred to as the "Association"), and Peter Ottley, John Kelley, Peter Byrne, Eugene Hollander, Irving Weissman and Sander Kolitch, the then Trustees, established a trust for the purpose of providing pension benefits for employees of the Association represented by the Union which was thereafter amended from time to time; and

WHEREAS, the said Agreement and Declaration of Trust, as amended, provides that the same may be amended by an instrument in writing executed by the Association-appointed Trustees and the Union-appointed Trustees; and

WHEREAS, John Kelley, Peter Ottley, Clarence Morgan, Moses Braunstein, Meyer Temkin and Dr. Lee Licht-

man now constitute the Trustees of the said Local 144—Nursing Home Pension Fund; and

WHEREAS, the Trustees desire to further amend said Agreement and Declaration of Trust as hereinafter set forth,

NOW, THEREFORE, the Agreement and Declaration of Trust is hereby amended and restated to provide as follows:

ARTICLE I

DEFINITIONS

Section 1. EMPLOYER. The term "Employer" shall mean each Employer who (a) is a member of the Association whose employees are covered by any collective bargaining agreement existing between the Union and the Association, and (b) is not a member of the Association but with whom the Union enters into a collective bargaining agreement. The term "Employer" shall also mean for the purpose of this Agreement, the Union and any affiliated Union or Fund so long as said Unions or said Funds make contributions to this Fund on the same basis as any other Employer, pursuant to acceptance by the Trustees.

Section 2. EMPLOYEE. The term "Employee" means any individual employed by an Employer.

Section 3. PARTICIPANT. "Participant" as used herein means any employee or former employee of any Employer who makes contributions in behalf of such employee or of any employee benefit plan maintained by the Union, or any member or former member of an employee organization who is or may become eligible to receive a benefit of any type from the employee benefit plan established by this agreement, or whose beneficiaries may be eligible to receive such benefit.

Section 4. TRUSTEES. The term "Trustees" shall mean the Trustees designated, nominated and appointed

in accordance with this Agreement and Declaration of Trust and any successor Trustees designated in the manner provided herein.

Section 5. AGREEMENT AND DECLARATION OF TRUST. The terms "Agreement and Declaration of Trust" and "Trust" as used herein shall mean this instrument including any amendments hereto and modification hereof and the trust created hereunder.

Section 6. PENSION PLAN. The term "Pension Plan" as used herein means the Employee Benefit Plan, program, method and procedure for the payment by the Trustees of benefits from the Trust Fund, in accordance with such rules and regulations relating to eligibility requirements, including retirement age, amount and computation of benefits and the general administration and operation of the Trust Fund as the Trustees may from time to time adopt and promulgate.

Section 7. CONTRIBUTIONS. The term "Contributions" as used herein shall mean the payments made to the Trustees by the Employers, whether under and pursuant to collective bargaining agreements or other written agreements for the purposes set forth in the Agreement and Declaration of Trust.

Section 8. PENSION FUND. The term "Pension Fund" shall mean the "Local 144—Nursing Home Pension Fund."

Section 9. TRUST FUND. The term "Trust Fund" shall mean the contributions paid by the Employers, together with all income, increments, earnings and profits therefrom and all other assets, whether cash, credits, securities of any type, property or interest in property, any life insurance or annuity contract or contracts held in or forming a part of, the Pension Fund.

Section 10. BENEFICIARY. The term "Beneficiary" means any person designated by a participant or by the

terms of the Pension Plan who is or may be entitled to a benefit thereunder.

Section 11. INVESTMENT MANAGER. "Investment Manager" means any fiduciary other than a Trustee or named fiduciary who has the power to manage, acquire or dispose of any asset of the Plan, is a registered investment adviser or a bank as defined in the Investment Advisers Act of 1940 or an insurance company qualified to exercise said powers under the laws of more than one state of the United States. and has acknowledged in writing that he is a fiduciary with respect to the Plan.

ARTICLE II

NAME

This Trust Fund shall be known as the Local 144—Nursing Home Pension Fund, and the Trustees shall conduct the business of the Trust and execute all agreement in that name.

ARTICLE III

PURPOSES

The exclusive purposes of the Trust Fund shall be to provide, pursuant to a Pension Plan to be formulated, pension and retirement benefits for the employees as herein defined and defraying the reasonable expenses of administering the Trust and the Fund.

ARTICLE IV

APPROVAL OF GOVERNMENTAL AGENCIES

Section 1. The Pension Plan established under this Agreement and Declaration of Trust shall be as qualifies under the Internal Revenue Code and the Employees Retirement Income Security Act of 1974, and qualifies for tax deductibility of the contributions made by Employers to the Trust Fund.

Section 2. The Trustees shall submit this Agreement and Declaration of Trust, the Pension Plan and such other information as it may be required to submit to the Internal Revenue Service for a ruling as to the qualifications of the Pension Plan under the Internal Revenue Code, or to the Department of Labor, the Internal Revenue Service, and any other federal departments or agencies as may be necessary to comply with the provisions of the Employee Retirement Income Security Act of 1974. In making such submissions, the Trustes shall provide such data and make such representations on their behalf and on behalf of contributing employers as may be required. In making such submissions, the Trustees shall engage the services of an actuary who has been enrolled by the Joint Board for the Enrollment of Actuaries established pursuant to the Employee Retirement Income Security Act of 1974.

ARTICLE V

CONTRIBUTIONS TO THE TRUST FUND

Section 1. The contributions of the Employers shall be made in accordance with the collective bargaining agreements made by the Union, the Association and the Employers on behalf of covered employees, and shall be paid to the Trustees at such regular intervals, in accordance with said collective bargaining agreements, and as the Trustees shall direct.

Section 2. (a) In addition to all other remedies, if the Trustees, or any of them, shall complain that any Employer has not made full payment to the Trustees as required under the provisions of any of the collective bargaining agreements, such complaint shall be handled in the same manner as provided for in the grievance and arbitration provisions contained in whatever collective bargaining agreement applies.

(b) The Trustees likewise are hereby given the right, in their own names as Trustees, to institute or intervene in any proceeding at law, in equity, or in bankruptcy for the purpose of effectuating the collection of any sums due to them from any Employer under the provisions of the applicable collective bargaining agreement. The Trustees are hereby empowered to seek all damages, including but not limited to liquidated damages, interest at such rate as the Trustees shall from time to time determine and the costs and legal fees incurred by it in such proceeding, as are or may be due to the Fund.

ARTICLE VI

POWERS, DUTIES, EXPENSES AND FEES OF THE TRUSTEES

Section 1. The Trustees may, among other things:

(a) Accept and receive all contributions, income, monies and other property, and shall have the exclusive power to hold, invest, reinvest, manage and administer same, subject to the limitations provided herein, for the uses, purposes and trusts herein provided, except to the extent that authority to manage, acquire or dispose of the assets of the Fund is delegated to one or more investment managers as hereinafter provided.

(b) Formulate, adopt and administer a Pension Plan for the exclusive benefit of the covered employees in order to provide pensions and retirement benefits for the covered employees. Both the principal and income of the Trust Fund may be disbursed and distributed for the purposes set forth herein.

(c) Promulgate and establish rules and regulations for the administration and operation of the Pension Plan in order to effectuate the purposes thereof; and in pursuance thereto (but without limitation of the powers of the Trustees by reason of such enumeration), formulate and establish the conditions of eligibility with re-

spect to age and length of service, past and future service benefit credits, the method of providing pensions, the investment of funds and any and all other matters which the Trustees, in their discretion, may deem necessary or proper to effectuate the purposes and intent of the Pension Plan.

(d) Establish as part of the Trust Fund such reserve or reserves as the Trustees shall in their opinion deem necessary or advisable for the sound and efficient administration of the Pension Plan.

(e) Receive any securities or other property of any kind, nature or description whatsoever that are tendered to them and that they deem to be acceptable.

(f) Enter into agreements, contracts and other instruments for the deposits of funds with banks, trust companies or other institutions whose deposits are insured by the Federal Deposit Insurance Corporation, which accept and hold monies on deposits, and to authorize such depositary to act as custodian of the funds, whether in cash or securities or other property.

(g) The Trustees are empowered to enter into Agreements, contracts and other instruments for the deposit or investment of funds with banks and trust companies and to delegate to such banks and trust companies such power and authority as may be necessary to effectuate this purpose, as well as to authorize such depository to act as custodian of the funds, whether in cash, securities or other property. To provide for the administration of the Trust Fund, the Trustees in their discretion (but acting with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims) (1) may appoint as investment manager an organization or entity which has the power to manage, acquire, or to dispose of any asset of

a Plan as defined in the Employee Retirement Income Security Act of 1974 and which is (i) registered as an investment adviser under the Investment Advisers Act of 1940; (ii) a bank as defined in that Act or (iii) an insurance company qualified to perform these services under the laws of more than one state of the United States, (2) may transfer to the investment manager all, or such part as they deem desirable, of the assets of the Fund, and (3) may enter into an agreement with the investment manager which shall be in such form and contain such provisions as the Trustees may deem appropriate and consistent with the provisions of the Employee Retirement Income Security Act of 1974, including, but not limited to, provisions relating to delegating to the investment manager, authority to manage, acquire or dispose of the assets of the Fund transferred to it, the acknowledgement by the investment manager it is a fiduciary with respect to the Plan formulated and adopted by the Trustees, the authority of the Trustees to amend the agreement with the investment manager, and the authority of the Trustees to settle the accounts of the investment manager on behalf of all persons having an interest in the Fund.

Any such appointment or Agreement shall be subject to termination by the Trustes upon thirty (30) days notice. Without limiting the generality of the foregoing, the agreement with the investment manager may authorize the investment manager to invest and reinvest the assets transferred to it in interests in any trust fund that has been or shall be created and maintained by the investment manager as trustee for the collective investment of funds for employee benefit plans qualified under Section 401 (a) of the Internal Revenue Code of 1954, as amended (or corresponding provisions of any subsequent Federal revenue law at the time in effect), the instrument creating such trust fund, together with any amendments, modifications or supplements thereof, being hereby effective

when and as such investments are made incorporated in and made a part of this Agreement and Declaration of Trust as fully and to all intents and purposes as if set forth herein at length.

(h) Authorize withdrawals of monies from such account or accounts, but only by orders or checks signed by such of the Trustees as shall have been authorized in writing by the Trustes to sign the same.

(i) The Trustees may invest and reinvest such funds of the Trust Fund as are not required for current expenditures in such securities as are legal for the investment of trust funds in the State of New York.

Section 2. In addition to all other rights, powers and prerogatives vested in them, the Trustees may:

(a) Hold from time to time any or all of the Trust Fund in cash, uninvested and non-productive of interest or other income.

(b) Sell, transfer, or dispose of any securities or other property at any time held by them for cash or on credit; and convert, or exchange any securities or other property at any time held by them for other securities or property which the Trustees may deem acceptable, subject to the limitation herein contained. Any such sale, transfer, disposition, conversion or exchange may be made publicly or by private arrangement.

(c) Consent to the reorganization, consolidation, merger, dissolution, or readjustment of the finances, of any corporation, company or Association, any of the securities of which may at any time be held hereunder, exercise any option or options make any agreement or subscription, pay any expenses, assessments or subscriptions, in connection therewith and hold and retain any property acquired by means of the exercise of the powers expressed in this paragraph to the extent that it is acceptable to the Trustees.

(d) Comprise, arbitrate, settle, adjust or release any suit or legal proceeding, claim, debt, damage or undertaking due or owing to the Trust Fund on such terms and conditions as the Trustees may deem advisable.

(e) Lease or purchase such premises, materials, supplies and equipment, and employ and retain such legal counsel, investment counsel, administrative, accounting, actuarial, clerical, custodial and other assistants or employees as in their discretion the Trustees may deem necessary or appropriate and to pay their reasonable expenses and compensation out of the Trust Fund.

(f) Vote in person or by proxy or otherwise upon securities held by the Trustees and to exercise by attorney or in any other manner any other rights of whatsoever nature pertaining to securities or any other property at any time held by them hereunder.

(g) Make, execute and deliver as Trustees any and all instruments in writing necessary or proper for effective exercise of any of the Trustes' powers as stated herein or otherwise necessary to accomplish the purposes of the Trust Fund and this Trust Agreement.

(h) Borrow money from any and all types of persons, companies or institutions upon such terms and conditions as the Trustees may deem desirable and for the sums so borrowed or advanced, the Trustees may issue promissory notes or other evidence of indebtedness as Trustees, and secure the payment thereof by the pledge of any securities or other property in their possession as Trustees.

(i) Authorize by resolution any one or more of the Trustees to execute any notice or other instrument in writing and all persons, partnerships, corporations or associations may rely thereupon that such notice or instrument has been duly authorized and is binding on the Trust Fund and the Trustees.

(j) Do all other acts, and take any and all other actions, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder, and for the effectuation of the purposes of the Pension Plan.

Section 3. The Trustees may delegate any of their ministerial powers or duties hereunder to any of their agents or employees, including one or more of the Trustees. The Trustees may appoint a Fund manager to perform administrative and such other duties as the Trustees may from time to time lawfully delegate. The Trustees may allocate responsibilities among themselves and designate persons other than Trustees to carry out fiduciary responsibilities as provided in this Agreement and Declaration of Trust. The power to allocate fiduciary responsibility shall not apply to the allocation of the power to manage and/or control the assets of the Fund and the Plan, other than the power to appoint an investment manager or managers.

Section 4. The Trustees shall have and maintain an office in the City and County of New York, which shall be deemed the situs of the Trust Fund. The Trustees may from time to time change the location of said office within the City and County of New York, but no change shall be effective until notice theerof shall have been given to the Union, the Association, and the other Employers.

Section 5. Notices given to the Trustes, the Union, the Association, or the Employers, shall, unless otherwise specified be sufficient if in writing and delivered to, or sent by postpaid first class mail or prepaid telegram. Except as herein otherwise provided, distribution or delivery of any statement or document required hereunder to be made to the Trustees, Association, Union or Employers shall be sufficient if delivered in person or if sent by postpaid first class mail.

Section 6. The expenses incurred in the collection of contributions and in the administration and operation of the Trust Fund shall be paid from the Trust Fund. Insofar as practicable the Trustees shall utilize all facilities offered to them by the Union to collect employer contributions.

Section 7. The Trustees may, in their sole discretion, enter into such reciprocity agreement or agreements with other funds as they determine to be in the best interests of the Fund, the participants and the beneficiaries, provided that any such reciprocity agreement or agreements shall not be inconsistent with the terms of this Trust Agreement or the collective bargaining agreements under which this Trust Agreement is maintained.

Section 8. The Trustees shall have the power to merge with any other fund established for similar purposes as this Trust Fund under terms and conditions mutually agreeable to the respective Trustees.

Section 9. Any Trustee or fiduciary with respect to the Trust or Plan may receive such benefits as he may be entitled to as a participant. Any fiduciary with respect to the Trust or Plan may receive reimbursement of expenses properly and actually incurred in the performance of his duties with the Plan. Such reasonable expenses shall include the costs incurred in attendance at and participation in appropriate educational conferences held for fiduciaries, administrators, and fund managers. However, no fiduciary shall receive compensation from the Plan other than for reimbursement of expenses actually and properly incurred.

ARTICLE VII

ACCOUNTS, RECORDS AND AUDITING THEREOF

Section 1. All income, recoveries, contributions, forfeitures and any and all monies, securities and properties of any kind at any time received or held by the Trustees hereunder shall be held for the uses and purposes hereof.

Section 2. The Trustees shall procure an audit of the books of the Trust by a certified public accountant not less frequently than once each year, and shall engage the services of an enrolled actuary for the purposes of preparing all actuarial information and actuarial valuations as required by law. A copy of this audit along with a Plan description, the bargaining agreement, Trust Agreement, contract or other instruments under which the Plan was established or is operated and all other reports and schedules required by law to be in the Annual Report to the Secretary of Labor shall be available for inspection by all authorized persons, including participants and beneficiaries. These reports shall be available in the principal office of the Administrator and such other locations, including those which may be prescribed by law, as is necessary to make available all pertinent information to all participants.

The Trustees shall furnish to each participant covered under the Plan and to each beneficiary receiving benefits under the Plan a copy of the current Summary Plan description and Annual Report as required by law. Upon written request of a participant or beneficiary receiving Plan benefits and at a reasonable charge, the Trustees shall furnish any participant or beneficiary receiving benefits a copy of the updated Summary Plan description, Plan description, Annual Report, Trust Agreement or other instruments related to the establishment or operation of the Plan.

Section 3. The Trustees shall have the right to request records from ~~contributing~~ Employers with respect to wages and employment and shall have the right to examine said wage and employment records through duly authorized representatives including certified public accountants.

Section 4. The Trustees shall furnish to an Employer after completion of an audit, pursuant to Article VII,

Section 3 hereof, a written audit report. The Employer shall have fifteen (15) days from receipt of the report within which to request from the Trustees a conference to discuss the audit. The Employer shall pay any delinquent amount within thirty (30) days from the date of the conference with interest at the rate of six (6) per cent per annum from the date when payment was due.

Section 5. The expense of the first audit of an Employer's records whenever performed by the representatives of the Trustees, pursuant to Article VII, Section 3 hereof, shall be paid by the Trustees. If a second or subsequent audit is performed, pursuant to Article VII, Section 3 hereof, same shall be paid by the Trustees unless a delinquency is established in an amount in excess of $500.00, in which event the Trustees shall require the Employer to pay for the cost of the audit with interest on the delinquency at the rate of six (6) per cent per annum from the date payment was due.

ARTICLE VIII

CLAIMS AND INDIVIDUAL RIGHTS

Section 1. No Employer or employee, or any person claiming by or through such employee by reason of having been named a beneficiary, in a certificate or otherwise, shall have any rights, title or interest in or to the funds or other property of the Trust Fund or any part thereof, except that employees shall have the right to such benefits as may specifically be provided by the Plan.

Section 2. No employee shall have the option to receive any part of the Employer's contribution instead of the benefits provided by the Fund, or to receive a cash consideration in lieu of such benefits, either upon the termination of the Trust or his withdrawal through severance of employment or otherwise, except as permitted by the Employee Retirement Income Security Act of 1974.

Section 3. No monies, property or equity of any nature whatsoever in the Trust Fund or benefits or monies payable therefrom shall be subject in any manner, by any employee or person claiming through such employee, to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance, garnishment, mortgage, lien or charge, and any attempt to cause the same to be subject thereto shall be null and void.

Section 4. The assets of the Fund and of the Plan shall at no time inure to the benefit of any Employer. No claim for a refund of a contribution or other payment to the Fund shall be allowed except as permitted by the Employee Retirement Income Security Act of 1974, and then only upon the basis of such evidence as the Trustees may require.

ARTICLE IX

OBLIGATIONS AND LIABILITIES OF TRUSTEES AND OTHER PERSONS

Section 1. Each Trustee or other Plan Fiduciary shall exercise the powers of management and investment of the Trust assets granted to him under this instrument with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. Such prudent management shall include the diversification of investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to diversify such investments.

Section 2. A fiduciary with respect to the Plan shall not:

(a) deal with the assets of the Plan in his own interest or for his own account;

(b) act in any capacity in a transaction involving the Plan on behalf of a party whose interests are adverse to the interests of the Plan or its participants or beneficiaries;

(c) receive any consideration for his own account from any party dealing with the Plan in connection with a transaction involving Plan assets.

Section 3. Trustees or other fiduciaries are not liable if Trustee duties have been specifically assigned to a Co-Trustee for committing a breach of fiduciary responsibilities. Each Trustee shall be liable for a breach of fiduciary duty on the part of another Trustee if knowing of the breach of fiduciary responsibility, he participates in or undertakes to conceal an act or omission of such other Trustee or if with knowledge of a breach by another Trustee, he fails to make reasonable efforts to remedy the breach.

Section 4. If pursuant to this instrument a Trustee or other fiduciary allocates fiduciary responsibilities other than trustee responsibilities, the named fiduciary is not liable for the acts or omissions of the person designated to carry out such responsibilities, providing that the named fiduciary exercised the required degree of prudence, skill and care in making such allocation or designation. Trustee responsibilities for the purpose of this section are those responsibilities provided for in the Plan's trust instrument to manage or control the assets of a plan other than the power to appoint an investment manager.

Section 5. The Trustee shall not be liable either individually or as Trustees for any acts or omissions of a prudently-appointed investment manager (unless they participate knowingly in, or knowingly undertake to conceal, such act or omission, knowing such act or omission to be a breach of the investment manager's fiduciary responsibility with respect to the Plan), and shall be under

no obligation to invest or otherwise manage any assets of the Fund that is subject to the management of the investment manager.

Section 6. Each Trustee shall be protected in acting upon any paper or document believed to be genuine and to have been made, executed or delivered by the proper party purporting to have made, executed or delivered the same if it was reasonable and prudent under the circumstances to believe that such document was genuine and had been made, executed or delivered by the proper party.

Section 7. The Trustees shall not be bound by any notice, direction, requisition, advice or request, unless and until it shall have been received by the Trustees at the principal place of business of the Trust Fund.

Section 8. No party dealing with the Trustees in relation to this Trust shall be obliged to see to the application of any money or property of the Trust, or to see that the terms of this Trust have been complied with, or be obliged to inquire into the necessity or expediency of any act of the Trustees, and every instrument executed by the Trustees shall be conclusive in favor of every person relying thereon (1) that at the time of the delivery of said instrument the Trust hereby created was in full force and effect, (2) that the said instrument was executed in accordance with the terms and conditions contained in the Trust Agreement, and (3) that the Trustees were duly authorized and empowered to execute such instrument.

Section 9. The costs and expenses (including counsel fees) of any action, suit or proceeding brought by or against the Trustees, or any of them, shall be paid from the Fund, except in the event that in such action, suit or proceeding it is adjudged that such Trustees or Trustee breached the fiduciary obligations set forth in the Employee Retirement Income Security Act of 1974.

ARTICLE X

APPOINTMENT, REMOVAL, VOTING, RESIGNATION AND ADMINISTRATIVE FUNCTIONS OF TRUSTEES

Section 1. There shall be eight (8) Trustees, four (4) of whom shall be designated as Union-appointed Trustees, and the other four (4) as Association-appointed Trustees by the Association acting on behalf of all contributing Employers. The Trustees, each for himself, accept their appointment as Trustees and consent to act as Trustees hereunder, and declare and agree by virtue of the terms, conditions and provisions of this Trust Agreement and for the uses, purposes and trusts and with the powers and duties herein set forth and none other.

Section 2. Any vacancy in Union-designated Trustees shall be filled by appointment of the Executive Board of the Union and any vacancy in Association-designated Trustees shall be filled by appointment of the Association. No vacancy or vacancies in the office of Trustee shall impair the power of the remaining Trustees, acting in the manner herein provided, to administer the affairs of this Trust.

Section 3. The Union and the Association may remove any of their respective appointees at any time provided the party making such removal simultaneously appoints a successor in his place.

Section 4. Three (3) Union-appointed Trustees and three (3) Association-appointed Trustees present in person at any meeting shall constitute a quorum for the transaction of business. Decisions of the Trustees shall be made by the concurring vote of a majority of the Union-appointed Trustees and a majority of the Association-appointed Trustees present representing their group.

Section 5. A Trustee may resign by giving notice in writing to the remaining Trustees.

Section 6. The President and Secretary-Treasurer of the Union shall by virtue of their offices be members of the Board of Trustees. The other Union-appointed Trustees shall be designated by the Executive Board of the Union. The Union-appointed Trustees, however, shall be subject to removal by the Executive Board of the Union.

Section 7. The Trustees shall serve until removed or until their successors are duly appointed and designated except that the President and Secretary-Treasurer of the Union and the President of the Association shall serve as long as they continue to hold their respective offices in either the Union or the Association.

Section 8. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Union or any successor to any of them, a successor Trustee shall be designated by a resolution of the Executive Board of the Union, which shall be filed with the remaining Trustees. In the event of the resignation, completion of term of office, death, disqualification, removal, disability or refusal to act of any Trustee designated by the Association, his successor Trustees shall be designated in writing by the President of the Association which shall be filed with the remaining Trustees.

Section 9. The vote of the Trustees may be cast by them in person at a meeting or may be evidenced by written instruments signed by the required number of Trustees of the question to be decided.

Section 10. In the event the Trustees are unable to agree on action within seven days, the Trustees shall agree upon an impartial arbitrator to decide the matter or question in dispute and in the event of failure of the Trustees to agree upon an impartial arbitrator within seven days, any one of the Trustees may petition the American Arbitration Association for the appointment of an impartial arbitrator whose decision on the matter shall be final and binding.

Section 11. One of such Trustees shall be appointed by vote of the Trustees as Chairman of the Trust Fund and one of such Trustees shall be appointed as Secretary of the Trust Fund, but at all times one of those officers shall be a Union-appointed Trustee and the other shall be an Association-appointed Trustee.

Section 12. The Chairman or the Secretary or any three (3) Trustees may call a meeting of the Trustees at any time by giving at least five (5) days written notice of the time and place thereof to each Trustee. Meetings of the Trustees may also be held at any time without notice if all the Trustees consent thereto.

ARTICLE XI

TERMINATION OF THE TRUST

Section 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

(a) In the event the Trust Fund shall be, in the opinion of the Trustees, inadequate to carry out the intent and purpose of this Agreement, or to meet the payments due or to become due under this Agreement or the Pension Plan promulgated hereunder to persons already drawing benefits;

(b) In the event there are no individuals living who can qualify as participants or beneficiaries hereunder;

(c) In the event that the Pension Benefit Guaranty Corporation institutes a proceeding to terminate the Plan under the provisions of the Employee Retirement Income Security Act of 1974;

(d) In the event of termination as otherwise provided by law.

Section 2. In the event that this Trust shall terminate for any of the reasons set forth in Section 1 of this Article, the assets of the Trust Fund shall be allocated among the participants and beneficiaries of the Plan in

the manner set forth in the Plan in full accordance with the law, after making provisions for payment by the Fund of any and all obligations of the Trust, including expenses preceding and incidental to the termination and after a final audit has been made.

ARTICLE XII

BONDING AND INSURANCE

Section 1. Every fiduciary with respect to the Plan and every person who handles funds or other property of the Plan, except those exempted by the law, shall be bonded. Any individual designated by a Trustee to attend meetings of the Trustees and to act in his behalf in his absence shall also be bonded. The amount of such bond shall be fixed each year and shall be no less than 10 per cent of the amount of funds handled by the person, or class of persons covered by the bond, subject to the minimum and maximum limitations established by law. Such bond may not be procured from any surety or other company agent or broker in whose business operations such Plan or any party in interest has any direct or indirect control or significant financial interest. The cost of the premiums for such bonds shall be paid out of the Trust Fund.

Section 2. The Trustees may, in their discretion, obtain and maintain insurance policies, to the extent permitted by law, to cover liability or losses to the Fund or the Plan occurring by reason of the act or omission of a Trustee or fiduciary, or any employee, agent or designee of them or of the Fund, while engaged in business for or on its behalf, provided that such insurance policy shall permit recourse against the Trustee or fiduciary as may be required by law. The cost of the premiums of such policies shall be paid out of the Fund.

Section 3. The Trustees shall at all times pay such premiums as may be required by the Pension Benefit Guaranty Corporation.

Section 4. The Fund shall not pay premiums on any policy issued to indemnify any Trustee for recourse against him in his capacity as a fiduciary.

ARTICLE XIII

EXECUTION AND INTERPRETATION

Section 1. This Agreement and Declaration of Trust may be executed in one or more counterparts. The signature of a party on any counterpart shall be sufficient evidence of his execution hereof.

Section 2. This Trust is created and accepted in the State of New York and all questions pertaining to the validity or construction of this instrument and of the acts and transactions of the parties hereto shall be determined in accordance with the laws of the State of New York, except as preempted by the laws of the United States.

Section 3. The primary purpose of this Agreement and Declaration of Trust being to provide within the limits of the contributions provided for herein, a practical plan for benefits for employees upon their retirement, it is understood that the form of the Plan, and of this Agreement and Declaration of Trust, shall not give rise to a literal or formal interpretation or construction; such interpretation or construction shall be placed on this Agreement and Declaration of Trust, as will assist in the functioning of the Plan, for the benefit of employees, regardless of form.

Section 4. This Agreement and Declaration of Trust and the Plan established hereunder shall be deemed exclusively to define the powers, duties, rights and obligations of all persons in relation to the Trust Fund.

Section 5. Should any provision contained in this Agreement and Declaration of Trust, be deemed or held to be unlawful, such fact shall not adversely affect the other provisions herein and therein contained, unless such

illegality shall make impossible or impractical the functioning of the ultimate plan; no Trustee or other party to this Agreement shall be held liable for any act done or performed in pursuance of any provision herein or therein contained (regardless of the fact that such provision may be held unlawful) prior to the time when such provision shall in fact be held to be unlawful by a court of competent jurisdiction.

ARTICLE XV

AMENDMENTS

The provisions of this Agreement and Declaration of Trust may be amended to any extent, and at any time, by an instrument in writing executed by the Association-appointed Trustees and by the Union-appointed Trustees, provided that no amendment shall divert any of the Trust Fund then in the hands of the Trustees (and already paid in by Employers to the Trustees) from the purposes of this Trust Fund. Provided further that no such amendment shall permit any return or payments over any part of the then existing Trust Fund to any Employer. Any amendment must be such as will continue the Pension Fund's qualification under the Internal Revenue Code and will continue its qualification for tax deducitibility of the contributions made by Employers to the Trust Fund. No admendment shall divert any of the Trust from the purposes of this Fund, nor shall there be any amendment as a result of which there shall not be an equal number of Employer Trustees and Union Trustees. No amendment shall reduce retroactively the vested benefits of any participant, pensioner or beneficiary as of the time the amendment is adopted and no retroactive amendment shall reduce the accrued benefits of a participant, pensioner or beneficiary as of the first plan year to which the amendment applies.

ARTICLE XVI

EFFECTIVE DATE

The effective date hereof shall be that of the execution of this Trust Agreement.

IN WITNESS WHEREOF, the parties have hereunto affixed their hand and seals this 15th day of December, 1975.

/s/ Moses Brownstein (L.S.)	/s/ Peter Otley (L.S.)
/s/ Meyer Temkin (L.S.)	/s/ John Kelley (L.S.)
/s/ Lee Lichtman (L.S.)	/s/ Clarence Morgan (L.S.)

Exhibit A

Attachment VI—Selected Pages from the Local 144 Nursing Home Welfare Fund Group Insurance Plan booklet

INSURANCE PLAN

GROUP INSURANCE PLAN

[EMBLEM]

LOCAL 144
NURSING HOME
WELFARE FUND

* * * *

3. Your employer ceases to be a Contributing Employer,

4. The Group Insurance Policy is terminated.

Prescription Drug Coverage will terminate should one of the above occur as of the date shown on the prescription drug card.

If your employment ceases because of disability for which you receive weekly accident and sickness benefits or Workmen's Compensation benefits, coverage will be continued while you receive such benefits up to a maximum of 26 weeks from the day your employment stopped.

Your Accident and Sickness Insurance will terminate:

1. Upon termination of employment.
2. If the Group Insurance Policy is cancelled.
3. The date your employer ceases to be a Contributing Employer.

However, there are State Laws, which provide possible protection and coverage within the first four weeks following termination of benefits. Again, should such a disability arise, contact the Fund Office for advice as to your rights of coverage.

REINSTATEMENT OF INSURANCE

All of your benefits except Accident and Sickness Benefits will be reinstated on the date you return to full-time work for a Contributing Employer within six months after the date the insurance was terminated or if you return to work within 30 days after recovery from a disability for which you receive weekly accident and sickness benefits or Workmen's Compensation Benefits, or within 30 days of the termination of your insurance after 26 weeks of such disability.

If you do not return to work within the time specified above, you will be considered a new employee for group insurance purposes and it will be necessary for you to again fulfill the eligibility requirements also shown on page 5.

Exhibit A

Attachment VII—Local 144 Nursing Home Pension Plan, dated January 1, 1986

LOCAL 144 NURSING HOME PENSION PLAN

As Amended Through
January 1, 1986

LOCAL 144 NURSING HOME
Pension Plan

ARTICLE 1
Definitions

Section 1.01 Agreement.

"Agreement" means a written collective bargaining agreement between the Union and any employer, (including the Association), which requires contributions to the Fund in a manner acceptable to the Fund.

Section 1.02 Association

"Association" means the Greater New York Health Care Facilities Association, Inc.

Section 1.03 Beneficiary

"Beneficiary" means the person designated by a Participant or Pensioner to receive any monies due that Participant or Pensioner at the date of his death or becoming due by virtue of his death as specified in Sections 3.10 or 7.02.

Section 1.04 Contribution Date

"Contribution Date" with respect to each Participant means the first date as of which an Employer was or shall become obligated to make contributions to the Fund for the Participant, provided however that the Contribution Date with respect to a Participant who has incurred a Permanent Break in Service means the date as of which his subsequent Employer first became obligated to make contributions to the Fund.

Section 1.05 Covered Employment

"Covered Employment" means employment with an Employer as an Employee after the Contribution Date. For

periods prior to the Contribution Date "Covered Employment" shall include work performed in all nursing homes in New York City and environs including but not limited to work performed in jobs covered by an Agreement with the Union.

Section 1.06 Effective Date

"Effective Date" of the Plan shall mean September 1, 1976 except as otherwise specified in the Plan or as otherwise required by ERISA.

Section 1.07 Employee

"Employee" means a person who on or after the Effective Date is an employee of an Employer and who is covered by an Agreement between the Union and the Association or the Union and any other Employer and any employees of the Union, the Association or the Fund for whom contributions are required to be made to the Fund on the same basis as for any other Employer.

Section 1.08 Employer

"Employer" means pursuant to acceptance by the Trustees:

(a) An employer who is a member of the Association and whose Employees are covered by an Agreement in full force and effect;

(b) An employer who is not a member of the Association, but whose Employees are covered by an Agreement in full force and effect; and

(c) The Union, the Association or the Fund so long as such Union, Association or Fund make the required contributions to the Fund as any other Employer;

provided, however, that any such Employer shall not include any person, organization or business which is a member of a controlled group of corporations or under common control unless such other person, organization or

business has executed an Agreement and been accepted by the Trustees as an Employer.

Section 1.09 ERISA

"ERISA" means the Employee Retirement Income Security Act of 1974.

Section 1.10 Hour of Service

"Hour of Service" means each hour for which an Employee is paid or entitled to payment by an Employer for services performed on both a straight-time and over-time basis and any hour for which back pay is awarded or agreed to irrespective of litigation or damages.

Section 1.11 Normal Retirement Age

"Normal Retirement Age" means age sixty-five (65) or the age of the Participant on the tenth anniversary of Participation, whichever is later, excluding Participation before a Permanent Break in Service.

Section 1.12 Participant

"Participant" means an Employee who meets the requirements for participation in the Plan as set forth in Article 2.

Section 1.13 Pensioner

"Pensioner" means a person to whom a pension under this Plan is being paid or to whom such a pension would be paid except for time for administrative processing.

Section 1.14 Pension Credits

"Pension Credits" means the years of credit or portions thereof for purposes of benefit accrual for work in Covered Employment which are accumulated and maintained for Participants in accordance with the provisions of Article 4 of the Plan.

Section 1.15 Pension Plan

"Pension Plan" or "Plan" means the plan set forth in this document.

Section 1.16 Pension Fund

"Pension Fund" or "Fund" means the Local 144 Nursing Home Pension Fund established under the Trust Agreement.

Section 1.17 Plan Year

"Plan Year" means the period from January 1 to the next December 31.

Section 1.18 Retirement

(a) "Retirement" means cessation of employment or engaging in any of the following:

  (i) Employment with a Contributing Employer; or

  (ii) Employment with any Employer in the same or related business as any Contributing Employer; or

  (iii) Self-Employment in the same or related business as any Contributing Employer in a geographic area covered by the Plan; or

  (iv) Employment, or self-employment in any business which is or may be under the jurisdiction of the Union.

(b) *Exceptions.* A Participant who has ceased Covered Employment shall be considered Retired after attainment of his Normal Retirement Age, notwithstanding subsequent employment or re-employment with an Employer, or of the type described in this Section, if such employment or re-employment is for less than forty (40) hours in any month.

Section 1.19 Trust Agreement

"Trust Agreement" means the Agreement and Declaration of Trust establishing the Local 144 Nursing Home Pension Fund dated effective as of December 12, 1963 and as thereafter amended.

Section 1.20 Trustees

"Trustees" means the Board of Trustees as established and constituted from time to time in accordance with the Trust Agreement.

Section 1.21 Union

"Union" means Local 144 Hotel, Hospital, Nursing Home and Allied Services Union of the Service Employee International Union, AFL-CIO.

Section 1.22 Year of Participation

"Year of Participation" means a Plan Year in which a Participant has completed 870 Hours of Service.

Section 1.23 Gender

Except as the context may specifically require otherwise, use of the masculine gender shall be understood to include both masculine and feminine genders.

Section 1.24 Other Terms

Other terms are specifically defined as follows:

	Term	Section
(a)	ERISA	2.01
(b)	Regular Pension	3.02
(c)	Reduced Pension	3.03
(d)	Early Retirement Pension	3.04
(e)	Deferred Pension	3.05
(f)	Disability Pension	3.06
(g)	Pension Credits	4.01 and 4.02
(h)	Years of Vesting Service	4.05
(i)	Breaks in Service	4.06
(j)	Partial Pensions	5.01
(k)	Joint and Survivor Pension	6.01
(l)	Effective Date	6.06
(m)	Commencement Date	8.05
(n)	Retired or Retirement	8.06 and 1.18
(o)	Vested Status	8.08

ARTICLE 3

Pension Requirements and Benefit Amounts

Section 3.01 General

This article outlines the types of pensions provided under the Plan and the requirements which must be met in order for a Participant to be entitled to receive them.

Section 3.02 Regular Pension

(a) *Requirements.* A Participant shall be entitled to receive a pension, which shall be known as the Regular Pension, if at the time of his Retirement he meets the following requirements:

(i) he has attained age sixty-five (65); and

(ii) he has at least tweny-five (25) Pension Credits.

(b) *Amount.* The monthly amount of the Regular Pension is $350 for a Participant whose Retirement is on or after October 1, 1984.

Section 3.03 Reduced Pension

(a) *Requirements.* A Participant shall be entitled to receive a pension, which shall be known as the Reduced Pension, if at the time of his Retirement he meets the following requirements:

(i) he has attained age sixty-five (65); and

(ii) he has at least fifteen (15) but less than twenty-five (25) Pension Credits.

(b) *Amount.* The monthly amount of the Reduced Pension shall be that proportion of the Regular Pension which the number of Pension Credits which the Participant has accumulated bears to twenty-five (25). The resulting figure shall be rounded to the nearest multiple of fifty cents ($.50).

Section 3.04 Early Retirement Pension

(a) *Requirements.* A Participant shall be entitled to receive a pension, which shall be known as the Early Retirement Pension, if at the time of his Retirement he meets the following requirements:

(i) he has attained age fifty-five (55); and

(ii) he has at least fifteen (15) Pension Credits.

(b) *Amount.* The monthly amount of the Early Retirement Pension is as follows:

(i) There shall be first determined the amount of Regular or Reduced Pension to which the Participant would be entitled if he were then sixty-five (65) years of age;

(ii) The amount so determined shall then be reduced by one half of one percent (½%) for each month by which the Participant is younger than age sixty-five (65) on the Commencement Date of his Early Retirement Pension; and

(iii) The monthly amount so determined shall be rounded to the nearest multiple of fifty cents ($.50).

Exhibit B
Affidavit of Peter Ottley

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

AFFIDAVIT OF PETER OUTLEY

COUNTY OF NEW YORK)
) ss:
STATE OF NEW YORK)

Peter Ottley, being duly sworn, deposes and says:

1. I am the President of Local 144 Hotel, Hospital, Nursing Home and Allied Service Employees Union, SEIU, AFL-CIO (Local 144). I am also Chairman of the Local 144 Nursing Home Pension Fund and the New York City Nursing Home Local 144 Welfare Fund (collectively referred to as "Greater New York Funds"). I make this affidavit in response to certain statements in the affidavit of Jonathan L. Sulds which purportedly describes 1984 negotiations between Local 144 and certain employers to whom he was counsel, and to verify the authenticity of certain Collective Bargaining Agreements.

2. Mr. Sulds refers to discussions which he characterizes as having formed the basis for his clients' agreement to enter into the 1984 collective bargaining agreement with Local 144. Mr. Sulds says, absolutely inaccurately, that Local 144 had concurred in the notion that upon the establishment of new pension and welfare funds

by his clients (to be known as the Southern Funds) that reserves of the Greater New York Funds to which his clients were then contributors would be somehow divided and a portion transfered to the Southern Funds. There was never any such understanding. From time to time, as Mr. Sulds discussed the establishment of Southern Funds, Local 144 counsel cautioned Mr. Sulds and his clients that they were undertaking a substantial responsibility; that because of the relatively small number of employees who would be covered by the proposed new funds there would be a potential for substantial additional cost to the employers to maintain the same benefits for employees as had been provided to them under the terms of Greater New York Funds.

3. I either participated in or received reports of discusions with Mr. Sulds and Local 144's counsel in which our attorney questioned the wisdom of the creation of separate funds and suggested that Mr. Sulds' clients direct their efforts to gaining participation in the management of the Greater New York Funds rather than going off on their own.

4. Mr. Sulds refers to the case of Local 50 which he claims to have shown to me and to our counsel during negotiations. My attorney reminds me that Mr. Sulds did show a copy of the decision to her at a meeting at the New York University Club where certain of our negotiations took place. Not only did my counsel say to him that there was nothing in the case which would require any division of reserves if the new funds were created, but there was also a reminder that no funds should be created on such a speculative basis.

5. During negotiations we repeatedly questioned the good sense of Southern employers in undertaking the responsibility for establishing new funds. Because of the kinds of pensions the Southern group anticipated creating, the Southern employers gave assurances that nothing more than a short start-up period would be necessary to

accrue sufficient money to permit the new funds to operate.

6. Mr. Sulds' statement in paragraph 9 of his affidavit that I agreed to the concept that reduction in benefits could be avoided by division of the reserves is untrue. The only position I took with regard to benefits—and it is unvarying—was that the employers would be obliged to guarantee the same benefits as those provided by the Greater New York Funds. I understood my attorney to be expressing the same caution that I did that any shortfall would be the responsibility of the employers to make up. It was for that reason that we talked about potential fiduciary obligation and financial burden to the employers.

7. Mr. Sulds' statement that the Union's recognition that the Greater New York Funds were overfunded, and its anticipation that reserves would be divided, formed the basis for reaching a collective bargaining agreement is also categorically untrue.

8. Mr. Sulds is rewriting history when he attributes to me or to my counsel or to anyone on behalf of Local 144 any agreement with respect to reserves. Quite the contrary, the Union was determined to achieve only one result; that all of the employees covered by the Greater New York Funds would lose no benefits if the Southern employers ceased contributing to the Greater New York Funds and began contributing to the Southern Funds. There were repeated warnings that there could be personal liability on the part of the Southern Funds trustees if they failed to meet that obligation without regard to any potential for any monies obtained from the Greater New York Funds.

9. The Union negotiated for and obtained direct commitments in the collective bargaining agreements signed by each Southern employer that there would be a continuity of benefits for employees to be covered by the Southern Funds, and that no employee would lose benefits

because benefits would come from the Southern Funds rather than from the Greater Funds. In other words, the Union demanded and secured from each of the Southern employers a guarantee that if the Southern employers' actions in withdrawing from Greater Funds and establishing the Southern Funds could have any adverse effect on employees, the contracting Southern employers would be responsible for remedying that adverse effect. It was on the basis of these guarantees that the Union agreed to formation of the Southern Funds.

10. The section of the November 30, 1984 collective bargaining agreements entitled "Litigation" expressly did not commit the Union to take any affirmative action to promote the Southern employees' proposed lawsuit; indeed, the Union stated in that section only that it would not oppose the *bringing* of such an action by the employers "to the extent it is consistent with applicable law."

11. Mr. Sulds misstates the Union's basis for consent to the "Litigation" provision. As stated above, the Union's concerns were met by inserting provisions in the collective bargaining agreements binding the Southern employers to make good any harm caused by the new arrangement. The Union did not rely on the possibility that assets would be taken from the Greater New York Funds and placed in the Southern Funds. Instead, the Union legally bound the Southern employers to underwrite the payment of full benefits to the affected employees.

12. In 1981, the Southern employers did not negotiate with the Union as part of the Greater New York Health Care Facilities Association, Inc. The Southern employers negotiated and signed individual contracts with the Union in 1981, but the text of all the individual contracts was virtually identical insofar as they committed each of the plaintiff employees to make contributions to the Greater New York Funds. A true and correct copy of one of the individual contracts is attached as Attachment I.

13. A true and correct copy of the cover page, page 1, pages 21-28 and page 31 of the collective bargaining agreement between the Union and the Greater New York Health Care Facilities Association, Inc. dated April 1, 1981 is attached as Attachment II. This agreement covered the period April 1, 1981 through March 31, 1984.

/s/ Peter Ottley
PETER OTTLEY

(Noterization Omitted in Printing)

Exhibit B

Attachment I—Agreement between Local 144 and Fort Tryon Nursing Home and F.T.N.H. Management, Inc. dated April 3, 1981

AGREEMENT made and entered into this 3rd day of April, 1981 by and between Local 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICE EMPLOYEES UNION, SEIU, AFL-CIO ("Union") and FORT TRYON NURSING HOME AND F.T.N.H. MANAGEMENT, INC. ("Employer")

"Employer"

WITNESSETH:

WHEREAS, the parties acknowledge that they were fully bound by all of the terms and conditions of the Collective bargaining agreement between the Union and the Greater New York Health Care Facilities Association Inc. (consisting of the agreements covering the various bargaining units of employees represented by the Union), which collective bargaining agreement expired by its term on March 31, 1981; and

WHEREAS, the parties desire to extend and renew their contractual relationship;

NOW, THEREFORE, in consideration of the mutual promises herein contained, the parties agree as follows:

1. The parties extend and renew their contractual relationship for the three (3) year period commencing April 1, 1981 and continuing up to and including March 31, 1984 and agree that during such period they will be bound by all of the terms and conditions of the collective bargaining agreement between the Union and the Greater New York Health Care Facilities Association, Inc. (consisting of the agreement covering the various bargain-

ing units of employees represented by the Union) covering the period April 1, 1981 through March 31, 1984, except as modified in Paragraph "2" hereof.

2. Modifications:

a. All references to membership in or representation by the Greater New York Health Care Facilities Association, Inc. shall not be part of this agreement.

b. The parties hereto shall designate an Impartial Chairman to be agreed upon by their attorneys (Jonathan Sulds for the Employer and Irwin Bluestein for the Union) within ten (10) days. Failing to agree, they shall request the American Arbitration Association to make such designation.

c. In the event that the Union and the Southern New York Residential Health Care Facilities Association, Inc. shall establish a joint welfare fund providing for benefits no less than those provided by the welfare fund established by the Union and the Greater New York Health Care Facilities Association, Inc., the Employer shall be permitted to contribute to such fund and the Employer's employees will be covered by such fund.

3. Except as modified above, the terms and conditions of the collective bargaining agreement between the Union and the Greater New York Health Care Facilities Association, Inc. (consisting of the agreements covering the various bargaining units of employees represented by the Union) shall be binding on the parties for the three (3) year period commencing April 1, 1981 and continuing up through March 31, 1984.

IN WITNESS WHEREOF, the parties have executed this agreement as of the day and year first above written.

LOCAL 144, HOTEL, HOSPITAL,
NURSING HOME & ALLIED
SERVICE EMPLOYEES UNION,
SEIU, AFL-CIO

By: /s/ Peter Ottley
PETER OTTLEY
President

Employer
FORT TRYON NURSING HOME
By: /s/ Jack Friedman
JACK FRIEDMAN

Employer
F.T.N.H. MANAGEMENT, INC.
By: /s/ Nat Sherman
NAT SHERMAN

Exhibit B

Attachment II—Selected pages from Collective Bargaining Agreement between Local 144 and Greater New York Health Care Facilities Association, Inc. dated April 1, 1981

AGREEMENT

between

[EMBLEM]

LOCAL 144 HOTEL, HOSPITAL,

NURSING HOME & ALLIED SERVICE

EMPLOYEES UNION, SEIU, AFL-CIO

and

Greater New York Health Care

Facilities Association, Inc.

AGREEMENT made as of the 1st day of April, 1981, by and between LOCAL 144, HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICES UNION, SEIU, AFL-CIO (hereinafter referred to as the "Union") on behalf of itself and its members in the bargaining unit (hereinafter referred to as the "employees") now employed or hereafter to be employed by residential health care facility members of the GREATER NEW YORK HEALTH CARE FACILITIES ASSOCIATION, INC. (formerly known as the Metropolitan New York Nursing Home Association, Inc.) (hereinafter referred to as the "Association") and the Association on behalf of itself and those of its present members and those hereafter becoming members, who have authorized or shall authorize the making of this agreement (such members hereinafter being referred to as the "Employers").

WITNESSETH:

WHEREAS, the Association is a membership corporation consisting of Employers engaged in the ownership and/or operation of residential health care facilities; and

WHEREAS, the Union has been designated by the majority of the employees of the Employers in the bargaining unit as their sole collective bargaining agent with respect of wages, hours and other conditions of employment; and

WHEREAS, it is recognized that the efficient and orderly method of establishing and maintaining peaceful and harmonious labor relations and of dealing with the problems and controversies arising out of employment is through negotiations and agreement, rather than through strikes and lockouts; and

WHEREAS, the contracting parties are desirous of maintaining and promoting the highest standards of service and labor unity;

NOW, THEREFORE, in consideration of the mutual promises herein contained, the parties agree as follows:

* * * *

4. There shall be a special file cabinet on each floor for the use of the ward clerks.

5. To the extent practicable, there shall be an orderly or lifter for each floor.

6. The parties shall submit to a committee consisting of three (3) members designated by the Union and three (3) members designated by the Association the task of developing job descriptions for all classifications of employees covered by the agreement. The committee shall report back to the parties within one hundred and twenty (120) days.

20. WELFARE FUND

A. The Association and the Union shall continue to maintain a Welfare Fund, known as the New York City Nursing Home-Local 144 Welfare Fund for their employees and each Employer shall make contributions thereto for each employee covered by this agreement of eight and one-half (8½%) percent of the gross payroll of all bargaining unit employees. Effective October 1, 1983, such rate of contribution shall be increased to nine and one-half (9½%) percent of the said gross payroll. "Gross payroll" for the purpose of this provision shall be defined to exclude payment for unused sick days, uniforms, transportation allowance and meals.

B. Such contribution shall be paid by each Employer on or before the tenth day of each month and shall cover the previous months' employees covered by this agreement. In the event the Employer, without justification, fails to promptly remit such monies, the Impartial Chairman may upon application assess interest at the legal rate against the Employer.

C. The payments so made by the Employer shall be used by New York City Nursing Home-Local 144 Welfare Fund solely for those fringe benefits set forth in the Trust Agreement heretofore executed and thereafter amended establishing such New York City Nursing-Local 144 Welfare Fund.

D. The Employer shall furnish to the Union quarterly a statement indicating the names of the employees covered by this agreement, their social security numbers and the amount of wages paid, or such other report, record or statement as shall supply such information, and agree to make available for inspection to the Trustees of the Fund all payroll records that may be required for the sound and efficient operation of the Fund, or which may be required by the insurance companies, if any, insuring the employees.

E. The parties understand that the New York City Nursing Home-Local 144 Welfare Fund will be held and managed under the terms and provisions of an Agreement and Declaration of Trust executed in connection with the said Fund, copies of which are on file with the Association and the Union, and the Employers, although they may have the right to do so, shall be under no obligation to see to the application of monies paid to the Fund. The Fund shall submit annually to the Association and to the Union a report respecting the application of the monies received by it and the benefits paid.

F. Disability payments payable to the State will be included in the contributions paid by the Employer provided said amount will be sufficient to pay for the benefits now provided by the Fund in addition to such disability payments.

21. DENTAL FUND

A. The Association and the Union agree to establish a fund known as the New York City Nursing Home-Local 144 Dental Fund, for the purposes of providing dental

treatment to their employees. Each Employer shall make contributions thereto for each employee covered by this agreement of one (1%) percent of the gross payroll of all bargaining unit employees. "Gross payroll" for the purpose of this provision shall be defined to exclude payment for unused sick days, uniforms, transportation allowance and meals.

B. Such contributions shall be paid by each Employer on or before the tenth day of each month and shall cover the previous months' employees covered by this agreement. In the event the Employer, without justification, fails to promptly remit such monies, the Impartial Chairman may, upon application assess interest at the legal rate against the Employer.

C. The payments so made by the Employer shall be used by New York City Nursing Home-Local 144 Dental Fund solely for those fringe benefits set forth in the Trust Agreement to by adopted and executed establishing such New York City Nursing Home-Local 144 Dental Fund.

D. The Employer shall furnish to the Union quarterly a statement indicating the names and classifications of employees covered by this agreement, their social security numbers and the amount of wages paid or such other report, record or statement as shall supply such information, and agree to make available for inspection to the Trustees of the Fund all payroll records that may be required for the sound and efficient operation of the Fund, or which may be required by the insurance companies, if any, insuring the employees.

E. The parties understand that the New York City Nursing Home-Local 144 Dental Fund will be held and managed under the terms and provisions of an Agreement and Declaration of Trust to be executed in connection with the said Fund, copies of which will be placed on file with the Association and the Union, and the Employ-

ers, although they may have the right to do so, shall be under no obligation to see to the application of monies paid to the Fund. The Fund shall submit annually to the Association and to the Union a report respecting the application of the monies received by it and the benefits paid.

22. PENSION FUND

A. The Association and the Union shall continue to maintain a Pension Fund, known as the Local 144-Nursing Home Pension Fund for their employees and each Employer shall make contributions thereto for each of his employees covered by this agreement of five (5%) percent of the gross payroll of bargaining unit employees. Effective October 1, 1983, such rate of contribution shall be increased to six (6%) percent of the said gross payroll. "Gross payroll" for the purpose of this provision shall be defined to exclude payment for unused sick days, uniforms, transportation allowance and meals.

B. Such contributions shall be paid by each Employer on or before the tenth day of each month and shall cover the previous month's employees covered by this agreement. In the event the Employer, without justification fails to promptly remit such monies, the Impartial Chairman can, upon application, assess interest at the legal rate against the Employer.

C. The payments so made by the Employers shall be used by the Local 144-Nursing Home Pension Fund solely for those benefits set forth in the Trust Agreement executed hereunder and thereafter amended establishing such Local 144-Nursing Home Pension Fund.

D. The Employer shall furnish to the Union a statement indicating the names of the employees covered by this agreement, their social security numbers and the amount of wages paid, or such other report, record or statement as shall supply such information, and agree

to make available for inspection to the Trustees of the Fund all payroll records of bargaining unit employees that may be required for the sound and efficient operation of the Fund, or which may be required by the insurance companies, if any, insuring the employees.

E. The parties understand that the Local 144-Nursing Home Pension Fund will be held and managed under the terms and provisions of an Agreement and Declaration of Trust executed in connection with the said Fund, as the same from time to time might be amended, copies of which are on file with the Association and the Union, and the Employers, although they may have the right to do so, shall be under no obligation to see to the application of monies paid to the Fund. The Fund shall submit annually to the Association and to the Union a report respecting the application of the monies received by it and the benefits paid.

F. The parties shall increase the Pension Benefit at the following rates and the following dates:

January 1, 1979:	**Pension Benefit $225 per month**
December 15, 1979:	**Pension Benefit $275 per month**
September 1, 1981:	**Pension Benefit $300 per month**

23. SKILL AND PRODUCTIVITY IMPROVEMENT FUND

The Employers shall contribute one (1%) percent of "gross payroll," as that term is defined in the Welfare, Dental and Pension Fund provisions of this agreement, to a Skill and Productivity Improvement Fund (sometimes termed the "Education Fund").

24. CONTRIBUTIONS

A. "Gross payroll" for the purpose of contributions to the various Funds herein shall be frozen at the rates of pay in effect on September 30, 1980, through January 31, 1982.

If any employee, subsequent to the probationary period, one (1) week in a reporting month, the Employer must make contributions to the Funds on his behalf based on his entire gross pay for the reporting month, but need not in such cases pay disability benefit premiums for such employee during such month.

B. The Employer will not be required to make contributions to the Funds on behalf of casual employees who work less than the ERISA casual vesting hours as specified in the Trust indenture of Local 144-Nursing Home Pension Fund in a calendar year. In the event the total gross payroll for employees exceeds twenty (20%) percent of the total gross annual payroll of the facility, the Employer shall be required to make contributions on that amount exceeding twenty (20%) percent of the gross bargaining unit payroll. The casuals shall be subject to Union security provisions of the contract, and shall receive other contract benefits applicable to casuals. To ensure against abuses in the administration or implementation of the foregoing, John D. Feerick, Esq. shall review this matter upon request of either or both side.

C. Exculsions from Bargaining Unit

For the purposes of defining "gross payroll," the following job classifications shall be excluded:

a. Administrator and assistant, if any.

b. Director of Nursing Services.

c. Consultant Dietician.

d. Controller or Headbookkeeper, where there is no Controller; Controller and Headbookkeeper; Headbookkeeper and Assistant Bookkeeper, if any.

e. One confidential secretary (who spends the greater part of of her time working with administration).

f. Physical and Occupational Therapy Workers.

g. Executive Housekeeper (performs no floor work).

h. In-service Training Nurse (performs no floor work).

i. Consortium Trainees (until they are placed on staff).

j. Guard.

k. Social Workers (except as otherwise provided in Schedule "B").

D. In the event a dispute arises in connection with the failure of an Employer to make the required contributions to the various Local 144 Nursing Home Funds in the full amounts required, and in the event that the Union submits the matter to arbitration and prevails, the Arbitrator's decision shall contain a directive requiring the Employer to pay all reasonable audit and accountants' fees, the full amount of the Arbitrator's fees, collection expenses including court costs, if any, and interest at the then current legal rate, together with reasonable attorneys' fees for the attorney representing the Union and/or the Funds in connection with the arbitration and/or court proceedings.

Notwithstanding the foregoing, if any employee is disentitled to any benefits provided by the Funds by reason of an Employer's delinquency in the payment of contributions, such Employer shall be liable to such employee, in a civil action, for the full amount of the benefits which the employee lost, together with court costs. Acceptance or collection of delinquent contributions by the Fund shall not absolve the Employer of this liability.

E. In the event that an Employer is two or more months delinquent in making contributions to the various Local 144 Nursing Home Funds, then the Union may take such matter to arbitration and the Impartial Chairman, in addition to granting such other relief as he may deem appropriate in the premises, shall be empowered to direct

such Employer thereafter to enter into an irrevocable "check off" arrangement with the State of New York or such banking institution to enter into such a "check off" arrangement. Such "check off" arrangement must provide for the direct payment to the Funds by the State of New York or such banking institution of contributions due or becoming due from such Employer to the funds.

The Association shall prepare documents and establish procedures to be followed in connection with the above "check off" provision and Employers shall use such documents and follow such procedures wherever practicable.

Nothing contained in the above "check off" provisions or elsewhere herein shall preclude the Union from taking any other steps which it may deem appropriate in the case of a failure to make Fund contributions as required or make inapplicable any remedy available to the Union, contractually or otherwise.

25. SEVERANCE

Employees with one or more years of substantially continuous employment who are permanently laid-off shall receive severance pay at the rate of one (1) week of pay for each completed year of substantially continuous employment with an Employer up to a maximum of four (4) weeks of pay, which maximum shall be increased to six (6) weeks of pay effective April 1, 1982. For the purpose of this provision, a week's pay shall be defined as the regular weekly pay of the employee so affected which was in effect at the time of such permanent layoff.

26. CONTRACTING OUT

Any contract or agreement between the Employer and an outside contractor who employs employees of the Employer in job classifications covered by this agreement shall comply with all the terms and conditions of this agreement, including but not limited to the seniority and

layoff provisions, and the Employer guarantees the performance thereof by the contractor.

27. CHECK-OFF AUTHORIZATION

Upon written authorization, each Employer shall deduct from the first wages paid employees in each month all dues, assessments and initiation fees which the Union shall notify the Employer to be due to the Union from the employee. The monies so deducted shall be held by the Employers in trust and they shall remit them to the Union promptly, together with a list of employees paying said dues, including categories and wages paid. In the event the Employer without justification fails to promptly remit such monies, the Impartial Chairman may upon application assess interest at the legal rate against the Employer.

1. In determining the amount, if any, that an Employer's liability for contributions to the various Local 144 Nursing Home Funds was increased by reason of the Feerick Award, interest thereon shall commence and be calculated at the rate of twelve (12%) percent per annum from the date of the Award.

2. The Association shall, simultaneously with the execution hereof, turn over to the Local 144 Nursing Home Funds, for appropriate credit to the accounts of its affected Employer members, the moneys it has heretofore received on account of the Feerick Award from the State of New York, together with the actual interest earned on such money from the time of its receipt by the Association, but in no event shall such interest be at a lesser rate than twelve (12%) per annum.

B. Any Employer member of the Association which claims entitlement to 30% forgiveness of its 1976 Local 144 Nursing Home Welfare Fund liability on the ground that it has complied with the conditions imposed upon those claiming such entitlement by Eric Schmertz, Esq.,

shall submit such issue for binding determination to Eric Schmertz, Esq. within twenty (20) days from the date hereof, or it shall forever be deemed to have waived such claim.

IN WITNESS WHEREOF, the parties have caused this agreement to be signed by their proper officers as of the day and year first above written.

LOCAL 144 HOTEL, HOSPITAL, NURSING HOME & ALLIED SERVICE EMPLOYEES UNION, SEIU, AFL-CIO

By /s/ Peter Ottley, President
GREATER NEW YORK HEALTH CARE FACILITIES ASSOCIATION, INC.

By /s/ [Illegible]

Exhibit C

Affidavit of A.H. Higgs, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

AFFIDAVIT OF A. H. HIGGS, JR.

COUNTY OF NEW YORK)
) ss:
STATE OF NEW YORK)

A. H. Higgs, Jr., being duly sworn, deposes and says:

1. I am Vice President of the Martin E. Segal Company, Mid-Atlantic Division and ~~have~~ held this position since April 1, 1983. I have been employed at the Martin E. Segal Company for over 13 years and have been an account executive working with Trustees of multiemployer employer benefit funds for more than 11 years. In the course of my employment, I have had responsibility for more than 50 pension, health benefits and supplemental benefit funds. While the preponderance of these funds have been multiemployer employee benefit funds, there have also been association funds and single employer funds. The Martin E. Segal Company is retained to provide consultant services to the Local 144 Nursing Home Pension Fund and the New York City Nursing Home Local 144 Welfare Fund and I have been assigned to provide those services since 1975.

In addition to servicing ongoing funds, I have assisted trustees in establishing pension funds both in the United States, and overseas. Presently, I work with two large pension funds in the Commonwealth of the Bahamas. I am also a general Consultant for pension and health matters to the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO. In that capacity, I have assisted the International Association in the implementation of an international reciprocal agreement for both pension and health benefit funds of the International Association's Local Unions and District Councils.

2. I hold a B.S. in Engineering from the U.S. Naval Academy. I am a licensed broker for registered and excess lines business by the New York State Insurance Department and sub-licensee for the Martin E. Segal Company.

3. The Martin E. Segal Company ("Segal") has been a leading employee benefits and compensation consulting firm since 1939. Many widely accepted benefits and benefit provisions are innovations first conceived, designed and introduced by the Company. It serves a wide variety of national and international clients including corporations, state and local governments, non-profit organizations, and boards of trustees of employee benefit plans.

4. Segal provides actuarial and consulting services for more than 3,000 separate employee benefit and compensation programs covering more than 8,000,000 employees and their dependents. With regard to multiemployer employee benefit plans, the Martin E. Segal Company is the predominant benefit consulting firm in the nation, in that it serves about half of all the multiemployer plan participants in the country. (There are approximately 9 million employees plus their families in over 2,000 multiemployer pension plans in the country.) Segal experts have been consulted by Congressional committees, state legislatures, the Treasury Department, the Pension Benefit Guaranty Corporation, the Department of Labor, the

Department of Health and Human Services, the Equal Employment Opportunity Commission and other executive and regulatory agencies involved with legislation such as the Employee Retirement Income Security Act ("ERISA'), the Deficit Reduction Act ("DEFRA"), the Retirement Equity Act ("REA"), the Tax Equity and Fiscal Responsibility Act ("TEFRA"), and the Age Discrimination in Employment Act ("ADEA").

5. The concept of a group of individuals pooling their resources to provide against a common risk is a well established insurance principle. The strength of the group resides in the statistical probability of the insured risk not affecting each participant in the group. The larger the group, the greater the uniformity in the spread of the risk, meaning that the laws of probability normalized from year to year and the statistical occurrence of events are more predictable.

6. These principles are applicable whether the group concept is employed in the short-term to health benefits or in the long-term to defined benefit pension plans. Inherent in a group plan providing benefits is the fact that during a finite period of time, a significant number of the participants will not make a claim. However, those participants that do make claims form the experience of the group. The experience of the group plus expenses incurred less any return on assets determines the actual cost of benefits for any group. It is that resulting cost which, in a multiemployer benefit plan, must be paid by employer contributions to the plan.

7. The difference between a group health plan and a defined benefit pension plan is the funding period due to the anticipated benefit payment. Accordingly, a group health benefit plan's costs are adjusted each year based on an actual usage. A defined benefit pension plan's cost will change from year to year, but only on the basis of changes in planned utilization, anticipated expenses or

as a result of a different realized rate of return or anticipated rate of return on assets. Since the experience of a group is the key to determining the cost for a group, advance anticipation of the cost is of primary concern no matter what program of benefits is being contemplated. As such, the group's general characteristics: group size, age and sex distribution; marital mix; income; employment and industry association, are some of the factors that characterize a group and must be considered when anticipating a group's future cost.

8. Multiemployer benefit plans have generally produced large groups of individuals with certain communalities recognized by both underwriters of group health insurance and pension actuaries. For example, a local union plan covering specific job categories is often relatively uniform with regard to employment and income, but widely diverse with regard to age distribution because an entire working career can be, and often is, spent within a range of job classifications. Accordingly, a 55 year old employee will often be working next to a 25 year old employee in the same job classification and generally earning the same hourly wage. In addition, within an industry group one employer may have a generally older work force than another employer without regard to their relative or specific status in an industry. Typically, multiemployer funds do not differentiate between the characteristics of the employees of one employer and another in a local area industry and typically the negotiated employer contribution rate is essentially the same.

9. The Local 144 Nursing Home Pension Fund and New York City Nursing Home Local 144 Welfare Fund are considered as one homogeneous group for actuarial and underwriting cost purposes. In practice, employee characteristics are generally comingled for projection purposes. If such a practice were not followed, an employer's cost from year to year could fluctuate significantly and

there could be no industry collective bargaining agreement which anticipates either a level cost in the case of a Pension Fund or level increments in cost in the instance of a Welfare Fund.

10. Multiemployer health benefit funds can be typically described as pay-as-you-go funding arrangements. Each year's cost is a function of the plan-wide claims experience plus administration offset by interest on the Fund's reserves. Employer contributions are almost invariably comingled regardless of the number of employers that may be contributing to the Fund. Accordingly, for a multiemployer plan providing health benefits, the total group characteristics and claims in aggregate will determine the experience and (together with administrative expenses) the overall cost of the plan. The contribution rate for a multiemployer plan is therefore determined on a uniform basis plan-wide and is the funding mechanism to provide the promised benefits for all employees covered by the plan without regard to their employer or his employees' characteristics. The process is similar to an insurance carrier's establishing group rates for designated groups of employers or members of an organization. Accordingly, no specific consideration is given to a particular employer's employee characteristics or to the employer's employee experience under a plan. If the contributions of a particular employer in excess of the value of health benefits provided to the employer's employees were required to be paid out of the multiemployer plan to the benefit of that employer when the employer left the plan, only employers with a positive balance would likely choose to leave the plan and take assets from it. Employers with a negative balance would stay put, continuing to incur costs greater than their contributions. This is a classic case of the impermissible practice known to insurers as adverse selection. As a matter of actual practice of the Greater New York Funds, during the period I have serviced the Funds, neither of them has paid out any money to an employer or on behalf of an

employer, upon the withdrawal of the employer from the Fund.

11. Since the assets are placed in a comingled trust and experience is comingled, multiemployer funds cannot ascertain a specific employer's experience versus cost, especially where there is an insurance company involved. The New York City Nursing Home Local 144 Welfare Fund is, in this regard, a typical Multiemployer Fund. The costs and therefore contribution rates for the New York City Nursing Home Local 144 Fund have been developed using the above-described method, although a significant portion of the plan is underwritten by insurance carriers or provided through a prepaid health plan. With regard to the New York City Nursing Home Local 144 Welfare Fund, one of the main service providers of health benefits is the Health Insurance Plan of New York ("HIP"). HIP does not maintain experience records since it is a form of prepaid health care and rates are approved by the State of New York based on the whole organization's cost of doing business. As such, the value of the benefits provided to the employees of a particular employer cannot be ascertained. If benefits were to be purchased on an employer by employer basis, the total cost of providing benefits would be higher because the smaller groups result in greater fluctuations and therefore higher risks.

12. Most pension plans, especially those that meet the requirement for tax qualification of the Internal Revenue Service, use a system of advance funding. Since multiemployer defined benefit pension plans are required by their Trust or collective bargaining agreement language to be tax qualified by the Internal Revenue Service, they all employ a system of advance funding. Under such a procedure, assets are set aside in a Trust and costs are recognized before the participants retire. Generally, assets are accumulated during an employee's career, or during his participation in the plan, so that there will be

enough of an accumulation at the time of retirement to pay the benefits accrued. Advance funding is a requirement of the Employee Retirement Income Security Act of 1974 and the Local 144 Nursing Home Pension Fund complies with that requirement. Multiemployer defined benefit pension plans, when negotiated, almost invariably give service credit for an employee's former employment in an industry, commonly referred to as past service. Therefore, at the outset, a defined benefit pension plan incurs an initial liability for past service of an employee with an employer or employers in an industry. In many instances, as with the Local 144 Nursing Home Pension Fund, past service was recognized for any employment prior to the commencement of the plan with an industry employer in the Local area, whether the employer has been subsequently organized or not. Accordingly, a multiemployer defined benefit pension plan's funding must take into consideration the liability associated with past service which in most instances only is verified at retirement. Verification at retirement is the method currently employed by the Local 144 Nursing Home Pension Fund because verification of such service is generally dependent on the Social Security Administration's records of employment. As such, service before an employer began making contributions to a multiemployer pension fund cannot be attributed to any specific employer in advance of retirement and becomes part of a group's overall characteristics for cost purposes.

13. In a multiemployer defined benefit pension fund, an advance funding method must be selected keeping several factors in mind: (1) compliance with ERISA; (2) tax deductibility; (3) cash-flow considerations; and (4) accumulation targets. In addition, multiemployer defined benefit pension funds generally choose a method which minimizes fluctuations of cost from year to year because of collective bargaining. The Trustees of the Local 144 Nursing Home Pension Fund have adopted the Entry Age Normal Cost method which produces a level cost for the

plan from year to year if the group's characteristics, the plan of benefits and experience reflect the assumptions employed in the actuarial valuation. The object of the funding method and the use of the whole group's characteristics is to provide stable level costs from year to year regardless of an employee's movement among contributing employers. The result is an aggregate cost which is then divided by the number of plan participants and the per capita cost developed does not reflect the actuarial cost of their individual benefit accrual. The per capita cost is then translated into a plan cost of cents per hour or in the case of the Local 144 Nursing Home Pension Fund, a percentage of gross wages.

14. The per capita cost does not reflect the cost of the benefits accrued each year by an individual employee for a number of reasons. Included in the aggregate calculation is the assumption that some employees will not collect a benefit as a result of death, disability or the fact that they will leave the plan for any variety of reasons. These are called turn-over assumptions. Also included in the aggregate cost is an amortization payment on unfunded liability. This represents liability accepted by the Fund as a result of crediting past service for benefit accrual or the unfunded liability accepted by the Fund from a benefit improvement which applies the higher rate of accrual to all years of service, past and contributory and/or pensioner benefit improvements. Such an application of a benefit improvement means that employees and/or retirees are receiving credit for an incremental benefit relating to years of service when no contributions were made or that contributions were made in contemplation of a lower benefit. Lastly, the per capita cost assumes a uniform cost of benefit accrual for each participant when in fact the actuarial cost is age dependent—less at younger ages substantially more at older ages.

Accordingly, as with a health benefit fund, the contribution rate is a device to fund the aggregate cost of

the benefits for the group as a whole without regard to any specific employer's employees' characteristics. The actuarial calculations for the Local 144 Nursing Home Pension Fund are, in fact, generally developed as described above. More importantly, there are no distinctions between employees of one employer and another. In addition, past service benefit improvements for both active employees and pensioners have been instituted, and liabilities developed, without consideration of the effect such additional liability may have on employees of individual employers, but the group as a whole. Of significant note is the fact that the Local 144 Nursing Home Pension Fund records for individual employees only reflect their pension credits earned under the plan and do not reflect the employer that the employee worked for when earning pension credits.

15. It is also noteworthy that the Multiemployer Pension Plan Amendments Act of 1980 recognized the nature of multiemployer plans, insomuch that of the four methods of allocating withdrawal liability, three of the methods, the "presumptive", "two-pool" and "single pool", allocate unfunded vested liability on a percentage basis as an employer's contribution bears to all employer's contributions. While there has been no unfunded vested liability since 1980, the Local 144 Nursing Home Pension Fund has adopted the presumptive method of allocating withdrawal liability. Generally, contribution allocation methods are selected over the attributable method in a related industry situation because of the uniformity of contributions as a result of industry bargaining, but more importantly, because of the perceived movement of employees from one employer to another or the ability of employees to move from one employer to another. The Local 144 Nursing Home Pension Fund participants have such portability of skills within their industry and as such their movement might produce under the attributable method a disporportionate amount of withdrawal liability, especially since a "Last employer rule" would have

to have been adopted. A last employer rule assigns all liability of an employee to his last employer. It is very rare for multiemployer pension plans to adopt the attributable method of allocation of withdrawal liability.

/s/ A. H. Higgs, Jr.
A. H. HIGGS, JR.

(Notarization Omitted in Printing)

Exhibit D

Affidavit of William L. Boseski

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AFFIDAVIT OF WILLIAM L. BOSESKI

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

WILLIAM L. BOSESKI, being first duly sworn, deposes and says as follows:

1. Since 1977 I have served as the chief Accountant for Local 144—Greater New York Nursing Home Pension Fund (the "Pension Fund"), the New York Nursing Home—Local 144 Welfare Fund (the "Welfare Fund"), and the Local 144 Health Facilities Training and Upgrading Fund (the "Education Fund") (collectively referred to as the "Greater New York Funds").

2. As Chief Accountant, I am familiar with contribution rates required of participating employers of the Greater New York Funds. Employers are obligated by collective bargaining agreements to contribute at a specified rate, which is currently a specific percentage of each Fund of the wages earned by employees in work covered by the collective bargaining agreement. My collection activities are always based on these specific obligations. I have never made any adjustment to the amount of contributions demanded on behalf of the Greater New York Funds on account of calculation or prediction of the cost of providing benefits to a particular employer's work

force. To my knowledge, the Greater New York funds have made no study of the value of the benefits provided to the employees of any particular employer.

/s/ William L. Boseski
WILLIAM L. BOSESKI

(Notarization Omitted in Printing)

Exhibit E

Affidavit of Gerald E. Cole

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

AFFIDAVIT OF GERALD E. COLE

DISTRICT OF COLUMBIA) ss:

Gerald E. Cole, being duly sworn, deposes and says:

1. I have been a practicing attorney for 16 years and was employed by the Pension Benefit Guaranty Corporation from February, 1975 until September, 1983. During my tenure, I served in a number of different capacities. In the fall of 1977, I was assigned to the multiemployer task force, which was charged with preparing a report to the Congress on the condition of multiemployer plans and recommendations for legislation. I directed the preparation of the report and the development of the options discussed therein. I was promoted to Assistant Executive Director for Policy and Planning in 1979. While serving in that capacity, I represented the agency in negotiations on the bills that eventually became the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). Thereafter, as Assistant Executive Director, I was charged with formulating policy and preparing regulations to implement MPPA.

2. In the course of my official responsibilities at the PBGC, I was intensively involved in the development of legislative policy positions of the PBGC in connection with the bills which became the Multiemployer Pension Amendments Act of 1980 ("MPPAA"). During the consideration of that legislation in the Congress, I had a lead role as liasion between the PBGC and the Congress.

3. One of the situations the PBGC had experienced was that certain employers which had been contributing employers to a multiemployer pension plan were separated from the plan together with a transfer of significant liabilities to individual pension plans for the employers which left the multiemployer pension plan. The employers who separated from the multiemployer plan were in severe financial difficulty with the result that their individual pension plans soon terminated and made claims on the PBGC for payment of guaranteed benefits under the single employer termination insurance program provided in Title IV of ERISA. The fact that the multiemployer pension plan had transfered liabilities to the individual pension plans without transfering a fair share of assets had the effect of increasing the claims on the PBGC when the individual pension plans terminated. It was clear to PBGC's policy planners, therefore, that a multiemployer pension plan should not be allowed to transfer liabilities to another pension plan without some transfer of assets. The agency supported amendments to prevent such a transfer.

4. Another policy consideration for PBGC was avoidance of discrimination by plans among withdrawing employers. The agency believed that plans which transfer liabilities might not be evenhanded in transferring assets without some legal standard to guide them. In the case of a disfavored employer, a very small amount of assets might be transferred in relation to the liabilities that were shifted and to the pre-transfer funding of the transferor plan. An overly generous asset transfer might be

made in another case, leaving the transferor plan in worse financial condition than before. As a matter of policy, PBGC took the position that ERISA should require a reasonable degree of uniformity.

5. PBGC's policy-makers favored flexible rather than rigid regulation, allowing plan trustees, who are most familiar with the structure and needs of a plan, to formulate specific rules that are consistent with ERISA. Applying this approach to multiemployer plan liability and asset transfers, the agency supported general ERISA standards on matters such as uniformity, with implementation by individual plan rules when a plan makes an asset transfer. There was no desire to impose such requirements on plans that did not transfer liabilities.

6. PBGC's concerns arose only in connection with transfer of pension liabilities. At no time during the agency's consideration of the provisions which were enacted as Section 4234, or in discussion of those provisions with legislators or legislative staff, was it ever suggested that Section 4234 would apply to welfare plans or that a plan would be required to agree to a transfer of liabilities.

/s/ Gerald E. Cole
GERALD E. COLE

(Notarization Omitted in Printing)

Exhibit F

Affidavit of John Erlenborn

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

AFFIDAVIT OF JOHN ERLENBORN

DISTRICT OF COLUMBIA) ss:

John Erlenborn, being duly sworn, deposes and says:

1. That deponent is an attorney initially admitted to practice in the State of Illinois in the year 1950. That deponent was elected to serve in the House of Representatives of the United States Congress and entered upon that office in January 1965. In 1966, deponent was elected to serve on the Committee On Education and Labor and served continuously thereon until retirement from Congress in January, 1985. While serving on that Committee, deponent was the ranking minority member of the subcommittee which had jurisdiction of the legislation which became known as ERISA and was author of portions of that legislation. Deponent further was minority floor manager during floor debate, served on the Conference Committee which resolved the differences in the House and Senate versions and managed the debate on the adoption of the Conference Report. In 1980, deponent played similar roles in the passage of the Multiemployer Pension

Plan Amendments Act of 1980 ("MPPAA") and, with the help of professional staff, monitored the implementation of both ERISA and MPPAA. As one of the most active participants in shaping and securing the passage of both ERISA and MPPAA, deponent is aware of the intention of Congress in the passage of that legislation and especially Congressional intent in the passage of Sections 4234 and 4235 of ERISA.

2. Section 4234 of ERISA was enacted to deal with the situation where a multiemployer pension plan wants to transfer some of its liabilities to another plan. It was the intention of those of us in Congress who were overseeing passage of the MPPAA that, if a plan transfers liabilities it was responsible for before the transfer, the law requires that the plan also transfer an appropriate proportion of assets.

3. For those multiemployer plans which choose to transfer liabilities to another plan, there was included in Section 4234 a requirement that such transfers be pursuant to rules to be adopted by the plan.

4. Nothing in Section 4234 was intended to *force* a plan to transfer liabilities, or to have any effect absent a voluntary liability transfer. In contrast, Section 4235 does require transfer of vested liabilities, and assets, in one situation: an employer withdraws from a multiemployer plan because his employees vote a certified change of collective bargaining representatives and, as a result, the employees participate in the new union's multiemployer plan. Congress enacted Section 4235 to insure that the provision of benefits would shift in that situation from the multiemployer plan sponsored by the union that employees had rejected to the one sponsored by the union they had voted for.

5. It was Congress' intent to apply Section 4234's rules concerning asset transfers only in connection with an attempt by a multiemployer pension plan to transfer

some of its liability for vested benefits to another plan. There was never any intention to compel one pension plan to transfer its assets to another in the absence of such a liability transfer. Neither did Congress have any intention of applying the provisions of Section 4234, which was enacted in the Multiemployer Pension Plan Amendments Act of 1980, to welfare plans.

/s/ John Erlenborn
JOHN ERLENBORN

(Notarization Omitted in Printing)

Exhibit J

Affidavit of E. Calvin Golumbic

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

AFFIDAVIT OF E. CALVIN GOLUMBIC

DISTRICT OF COLUMBIA, ss:

E. Calvin Golumbic, being duly sworn, deposes and says:

1. I have been an attorney for 22 years and am a partner in the firm of Arent, Fox, Kintner, Plotkin & Kahn. I was counsel of record for the petitioners (*i.e.*, United Mine Workers of America Health and Retirement Funds, *et al.*) in the U.S. Supreme Court in the case of *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982). I also served as General Counsel of the United Mine Workers of America Health and Retirement Funds from 1979 to 1982.

2. The United Mine Workers of America Health and Retirement Funds, in accordance with the Funds' governing instruments, does not require that the contributions of a particular employer be used solely for benefits for the employees of that particular employer. Within each Fund, all assets of the Fund are available to pay all benefits in accordance with eligibility provisions of the Funds without reference to their source.

3. The facts before the U.S. Supreme Court in the *Robinson* case were consistent with paragraph 2 above.

/s/ E. Calvin Golumbic
E. CALVIN GOLUMBIC

(Notarization Omitted in Printing)

Exhibit K

Affidavit of Dan M. McGill

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

AFFIDAVIT OF DAN M. MCGILL

COUNTY OF PHILDELPHIA)
) ss:
STATE OF PENNSYLVANIA)

Dan M. McGill, being duly sworn, deposes and says:

1. I am the Chairman and Professor of Insurance in the Insurance Department of the Wharton School of the University of Pennsylvania, and the Chairman and Research Director of the Pension Research Council of the University of Pennsylvania. I am the Executive Director of the S.S. Huebner Foundation for Insurance Education, Chairman of the Governing Board of the Leonard Davis Institute of Health Economics, and have been Chairman for the last ten years of the Board of Pensions of the Presbyterian Church (U.S.A.) and one of its predecessor agencies.

I am the sole author of five (5) books on pensions, co-author of two (2) others and editor of three (3) more. The best known is *Fundamentals of Private Pensions*, first published in 1955 with four subsequent editions through 1984; the sixth edition is currently in progress. Over

100,000 copies of that volume have been purchased, and the book is widely used as the text for college and university pension courses. It is a prescribed text of the Society of Actuaries, and is widely used as a training text by insurance companies and pension consulting firms. I have frequently lectured and appeared on panels sponsored by national and regional organizations in the business, legal, financial and insurance fields, including the Society of Actuaries, the American Pension Conference, the American Bankers Association, the American Law Institute-American Bar Association, the International Foundation of Employee Benefit Plans, and the Practicing Law Institute, as well as in colleges and universities.

I served as a consultant to the Board of Governors of the Federal Reserve System on pension matters from 1962 to 1980. In 1963 and 1964, I was pension consultant to President Kennedy's Advisory Committee on Labor-Management Relations. I was a member of the United States Department of Labor Advisory Council on Employee Welfare Benefit and Pension Plans from 1966 to 1974. In 1967 and 1968, I was a member of the United States Treasury Department's Panel on Integration of Pension Plans. Beginning in 1975, I was the first Chairman of the Advisory Committee of the Pension Benefit Guaranty Corporation. I retained that position to 1978, and served as a member of the Advisory Committee to 1982.

I am an active consultant to governments and private institutions on pension matters. I have advised the City of Philadelphia, the State of New Jersey, and the Commonwealth of Puerto Rico on their retirement systems. Among the private institutions to which I have given pension advice, are E.I. du Pont de Nemours & Co., Coca-Cola Co., Exxon, Westvaco and Consolidated Natural Gas. I have been retained as an expert consultant on numerous instances by parties contemplating or engaged in litigation on pension matters, and in a limited number of cases I have agreed to give expert testimony.

2. Defined benefit pension plans promise a specific level of benefits to employees who meet the eligibility requirements of the plan. Benefits may be expressed in flat dollar amounts of monthly retirement payments per year of service, or in percentages of compensation for periods such as the last three years before retirement. In order to earn entitlement to the benefits, participants generally must earn credit for a number of years of service under the plan. When the participant satisfies this requirement, he becomes vested in his benefit, which means, generally speaking, that it cannot be forfeited. The employee's rights are against the pension plan, not the employer which sponsors it.

3. The employer sponsor of a defined benefit plan undertakes to fund the plan as required. In practice, this means that actuarial estimates are made of the funding required over a substantial period of time to pay benefits as they come due. The Employee Income Retirement Security Act of 1974 ("ERISA") provides that a minimum level of contributions, also actuarially determined, must be made each year.

4. ERISA also provides that those who control assets of the plan, called fiduciaries, must hold those assets solely for the purpose of providing funds with which to pay benefits under the terms of the plan. There are ERISA rules that bar the return of contributions made by an employer to an ongoing defined benefit plan, except for limited circumstances involving a miscalculation or a mistaken assumption.

5. Employees have no right to share in plan assets of employee pension benefit plans, except as provided by the terms of the plan. Thus, employees who are not employed a sufficient number of years under the plan to become vested receive no benefits, except return of their own contributions, if any, with interest.

6. Multiemployer defined benefit plans are a variant of the defined benefit plans already described. The rights

of participants in these plans are very similar to those of participants in single employer defined benefit plans. However, the individual employers who participate in a multiemployer plan have a different relationship to the plan, and different responsibilities under it, than sponsors of single employer plans, as explained below.

7. ERISA defines a multiemployer pension plan as a plan maintained pursuant to a collective bargaining agreement to which more than one employer is required to contribute.[1] Employers who become signatories to the collective bargaining agreement commit themselves to contribute to the plan on a basis specified in the agreement. Typically, the contributions of a particular employer do not reflect the demographic characteristics—attained age, sex, credited service, and family structure—of his own employee group. Rather, the contribution *rate* of each signatory employer is generally the same as that for every other employer, usually a specified *amount per hour* of covered employment or a specified *percentage of compensation* of covered employees. In some industries, *e.g.* coal mining, the contribution commitment is expressed in terms of *units of output*, such as an amount per ton of coal produced. The plan is administered, as required by federal law, by a joint board of trustees, composed of an equal number of union and employer representatives. The joint board determines the benefit structure of the plan, based upon actuarial estimates of future contributions and investment returns. The projected benefit payouts reflect the demographic characteristics of the composite workforce of the signatory employers, while the projected contribution income is based on estimated future employment for the workforces of the signatory employers. This type of plan standardizes pension costs for competing employers, stabiilizes actuarial and investment experience, affords the economies of large scale operations, and

[1] The statutory definition includes arrangements that involve more that one union or collective bargaining agreement.

provides for transferability of pension credits among the participating employers, thus accommodating labor mobility, an essential feature of a technology-driven economy.

8. Employees covered by a multiemployer plan accrue benefits based upon recognized periods of service under the plan, without regard to the employer or employers for whom the service was performed. The rate of benefit accrual is ordinarily the same for all employees of a given class, again unrelated to the employer or employers for whom the service was rendered. Nor is the benefit accrual necessarily dependent on the actual payment of the required contributions by the employing firm. Neither is a participant's benefit entitlement contingent on the continued financial viability or even existence of any particular employer. As long as the multiemployer plan continues, substituting new employers with comparable payrolls and workforce demographics for those who may leave for any reason, the participants' benefits are secure.

9. In return for contributions at the collectively bargained rate, the employer can offer to his employees the plan's benefit package. The contributions of all employers are available to the trustees of the plan to pay benefits for all eligible employees. As employers come and go, retirees will be paid from plan assets even if the employers for whom they worked have all left the plan and therefore no longer contribute to it. Contribution levels and benefit levels are adjusted from time to time so that, in the aggregate, employer contributions supply funds which, supplemented by investment earnings, are considered adequate on an actuarial basis to provide for payment of plan benefits.

10. By paying the set level of contributions, an employer shares the costs of the entire plan with all other participating employers. Because the composition of an employer's work force can affect the cost of providing pension benefits—a work force that is older than the average will lead to higher pension costs, for example—

an employer may contribute more, or less, than the pension costs incurred by his employees. In practice, nobody makes that comparison; one of the efficiencies of multiemployer plans is that they do not attempt to track costs so that they may be assigned to a particular employer. The same principle applies for individual employees. The amount contributed "for" that employee is fixed by a collectively bargained formula. The cost of the employee's welfare and pension benefits could fall anywhere in a wide range, depending on age, health or other variables.

11. Diversion of multiemployer pension plan assets to any use other than for payment of plan benefits (and necessary expenses) would undermine the operation of such plans.[2] The rationale is sometimes advanced that because a former participating employer made contributions on behalf of his employees, some or all of those contributions should follow the employer and his employees when they leave the multiemployer plan. Putting aside the contractual point that contributions were made in return for rights to plan benefits, not for mere pass-through of contributed amounts, any attempt to do so would be inconsistent with the basic concepts of multiemployer plans, and to measure the amount a multiemployer plan must disgorge would require wastefully detailed and complex accounting of income and imputed costs by the employer. Many multiemployer plans include hundreds, even thousands of employers, and often employees obtain credits under the plan while working for a number of different employers. Individual accounting would be so inordinately expensive that, as a practical matter, many multiemployer plans could not exist if they were forced to undertake it. More important, exposure to claims from any employer who could claim an excess of contributions over costs would destroy the principle on which multiemployer plans are built. No longer would

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[2] As indicated earlier, such diversion would also violate ERISA, §§ 403, 404 and 406. 29 U.S.C. §§ 1103, 1104 and 1106.

there be standardization of pension costs for competing employers, or the stability of experience that comes from broad based cost sharing. While plans would still have to bear losses from employers whose cost to the plan exceeded contributions—including the common situation of default in contributions, often by bankrupt employers—there would be no gain from better-than-average cases. In short, multiemployer plans are cost-sharing devices, and to the extent that cost-sharing is nullified by forced transfers, they will lose their viability.

/s/ Dan M. McGill
DAN M. MCGILL

(Notarization Omitted in Printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

PLAINTIFFS' RESPONSE TO DEFENDANTS' RULE 3(g) STATEMENT

Plaintiffs, by their attorneys Gibson, Dunn & Crutcher, hereby respond to defendants' Local Rule 3(g) Statement.

1. Plaintiffs' do not contest defendants' statements numbered 1-9.

2. Defendants' statement #10 is totally incorrect. As set forth in the attached affidavits, plaintiffs' records do not agree with the figures listed in statement #10. Moreover, defendants have not shown how these figures were derived, nor have plaintiffs had the opportunity to assess the accuracy of defendants calculations.

Dated: July 31, 1987
New York, New York

Respectfully submitted,

By: /s/ Jonathan L. Sulds
GIBSON, DUNN & CRUTCHER
Attorneys for Plaintiffs
200 Park Avenue
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

REPLY AFFIDAVIT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JONATHAN L. SULDS being duly sworn, deposes and says:

1. I am a member of the firm, Gibson, Dunn & Crutcher, attorneys for plaintiffs herein, and I make this reply affidavit in further support of plaintiffs' motion for summary judgment and in opposition to defedants' various motions now pending before the Court.

2. At the outset, as the Court is undoubtedly aware, Mr. Ottley has filed an affidavit which differs in numerous particulars from one I have previously filed. I stand by the recollections set forth in my initial affidavit. Mr. Ottley's account of the circumstances leading up to the establishment of the Southern Funds together with his peculiar notion of what the obligations of Local 144 are, in connection with this litigation are at variance, in my judgment, with the specific basis upon which Local 144 negotiated agreements with me on behalf of Southern employers and management companies. I also believe that his assertions are squarely contradicted by the lan-

guage of those agreements, a copy of which is attached to my initial affidavit. In a nutshell, the question is, why would a section concerning the bringing of this litigation and the union's not opposing it have been included in the various agreements with Southern employers and management companies, if it left Mr. Ottley free to file the affidavit he now has?

3. This reply affidavit addresses each of defendants' various motions. Initially, to the extent the motion to intervene by the Education Fund is in the judgment of the Court one which sets forth an adequate legal basis for intervention, we have no objection. I turn first to defendants' various contentions in connection with plaintiffs' motion for summary judgment and defendants' motions for summary judgment and to dismiss for lack of jurisdiction or standing. Thereafter, I turn to defendants' unauthorized motion for summary judgment on the counterclaims which is filed notwithstanding the specific understandings reached in pre-trial conference, and with defendants knowing full well that no discovery in connection with those counterclaims has taken place.

PLAINTIFFS' *LOCAL 50*, § 1414, AND EXCLUSIVE USE AND BENEFIT CLAIMS

4. In opposition to the claims by plaintiffs, defendants assert a variety of standing objections. In a nutshell, they contend that Southern employers, management companies, Southern employees, and Southern Funds' management trustees have no nexus to the Greater Funds and are not adversely affected by the failure of the Greater Funds to comply with ERISA § 1414's unequivocal mandate that the Greater Funds must each have in place asset transfer rules. Attached as Exhibit A to this affidavit are relevant pages from the depositions of representative plaintiffs in which they each testify to the harm suffered, the nexus to the Greater Funds, and the adverse effect the failure to have adopted asset transfer

rules works. The attached pages come from the depositions of Southern employees Lindsay and Fernicola, together with Southern employers and management trustees Dicker and Demisay and Grossman and Southern management company, BNH Management by Grossman.

5. As a group or individually these depositions plainly set forth that plaintiffs all have standing. Our accompanying reply memorandum of law provides this Court with the authority which so confirms.

DEFENDANTS' COUNTERCLAIM SUMMARY JUDGMENT MOTION

6. Although I did not attend the pre-trial conferences at which the briefing schedule was discussed, I am informed by our former associate, David J. Reilly, that the clear understanding of the Court, defendants and plaintiffs was that all the Court would consider in the context of these motions was plaintiffs' summary judgment motion and defendants' contentions on the merits of those motions. It is my understanding from speaking with Mr. Reilly and a review of the various scheduling orders that have been entered herein, that no authorization was given defendants to file the presently pending summary judgment motion with respect to their counterclaims.

7. Indeed, it is uncontested that there has been no discovery with respect to those counterclaims—and deliberately so because of the discussions with this Court. Because the authorization for bringing this motion at this time is lacking, it should be dismissed.

8. The lack of discovery with respect to defendants' counterclaims also establishes that the motion should not now proceed. (See Rule 56(f), Federal Rules of Civil Procedure.) As the accompanying affidavits on behalf of various plaintiffs show, there is considerable controversy regarding the basis for the Greater Funds' counterclaims and the failure of the Greater Funds appropriately to

provide Southern employers and management companies contractually agreed upon credits. Absent a review of Greater Funds' documentation concerning the counterclaims and the deposition of Greater Funds' personnel in order to make comprehensible exactly what position the Greater Funds are now taking and how they have calculated amounts allegedly due, discovery prior to resolution of this motion is essential and appropriate.*

9. It bears emphasizing that the facts which would be obtained through such discovery are within the exclusive control and possession of defendants and that such discovery will produce evidence essential to justify plaintiffs' opposition to defendants' counterclaim summary judgment. Nowhere in their motion papers do defendants say how they arrived at their claims.

10. Nor could there be any prejudice to defendants from proceeding in this way. Plaintiffs' claims here ultimately involve significantly more monies than do defendants' counterclaims. When fully resolved, even assuming defendants were right that monies were contractually due to the various Greater Funds by some or all Southern employers or management companies, the amount of monies due by the Greater Funds to the Southern Funds, in connection with plaintiffs' *Local 50* claim will be far greater than that due (if any) to the Greater Funds.

WHEREFORE plaintiffs' motion for summary motion should be granted in all respects. Defendants' motions for summary judgment on the merits,. to dismiss for

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* The Greater Funds and Local 144 have taken a contradictory, ever changing approach to the matters which are essential to defendants' counterclaims. Many of the issues involved, including the availability of credits, have been submitted to arbitration pursuant to the terms of the collective bargaining agreements between Local 144 and various Southern employers and management companies. The present status of such grievances is entirely unclear.

lack of jurisdiction and standing and for summary judgment on the counterclaims should be denied with leave to defendants to move in connection with their counterclaims once discovery has been had.

/s/ Jonathan L. Sulds
JONATHAN L. SULDS

(Notarization Omitted in Printing)

Transcript of Proceedings before Judge Sprizzo on February 26, 1988

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

New York, N.Y.
February 26, 1988

Before:

HON. JOHN E. SPRIZZO,
District Judge

APPEARANCES:

GIBSON DUNN & CRUTCHER
Attorneys for Plaintiff

By: JONATHAN L. SULDS, ESQ.

EPSTEIN BECKER & GREEN
Attorneys for Defendant

By: HENRY ROSE, ESQ.

[2] (Discussion off the record.)

THE COURT: Mr. Rose wants to put his portion of the argument on the record from this point.

MR. ROSE: In both the *Local 50* and in the *O'Hare* case, as we have noted already, the facts and the law predate the 1980 amendments to ERISA dealing with multiemployer plans. The significance of that date is underlined by the Second Circuit in the *O'Hare* case. Let me just read a footnote from the *O'Hare* case. "Most problems created by employer withdrawal from multiemployer pension plans have subsequently been resolved by statute in the Multiemployer Pension Plan Amendments Act of 1980, which however did not apply to changes in bargaining representation occurring before April 29, 1980." So that the Second Circuit recognized that their rulings have been, in effect, statutorily superseded.

THE COURT: Not superseded as to periods not covered by the statute.

MR. ROSE: That is correct.

THE COURT: Not relevant as to periods covered by the statute.

MR. ROSE: Yes, that is correct, your Honor.

The next point I want to make in connection with both of these cases is that both of them were motivated by putting a very high value on the protection of the [3] fundamental right of employees to have a free choice of collective bargaining agents.

THE COURT: That is clear as crystal.

MR. ROSE: It certainly is. And in contrast, in this case, in the present case, the issue arises not because of any such change. In fact, the employees had the same union representation as before. The issue arises here because a few employers wanted to withdraw from the Greater New York Funds. And they point out the employees remain with the same union.

In *Vornado*—

THE COURT: So you are saying in this case it was the employers' interest that was vindicated by the change in funds, not the employees.

MR. ROSE: Yes, your Honor.

THE COURT: Rest your mind. Regardless of what he says in his briefs, which I have read very carefully, I do not regard *Local 50* as dispositive for any one of a number of reasons, some of which you have referred to and some of which you will surely refer to shortly. I don't regard the case as dispositive, because I think it is factually distinguishable. I think it is probably correctly decided on its facts. Perhaps there is some language in the opinion which goes beyond what was necessary to decide that case in suggesting that in all [4] circumstances it is a violation of the law for the funds of one employer to be used for the benefit of employees of other employers. I don't think that language is necessarily consistent with the language of the statute itself. The only question is: Does it allow it after the employees have left the fund? I think there is an open question here. But I think *Local 50* was not dealing with the facts such as we have them here and was not dealing with a situation in which there may very well be a conflict with respect to the obligation which arises under ERISA to see to it that the funds are not used for the benefit of anybody other than a plan participant and the conflict which may be posed by an overexpansive reading of Section 302. So I think these facts are unique. The balancing process is different.

To the extent that your argument is designed to persuade me that *Local 50* is not dispositive, I don't think you need to do that, because I do not regard it as dispositive. Whatever I decide here, the Second Circuit will get another crack at it to tell me whether, on the facts of this case, I am right or wrong.

I am aware of the factual distinctions. You point out one or two new factual distinctions which I was not aware of, which I will put on the record.

(1a) There is a particular provision of the [5] collective bargaining agreement which would foreclose the transfer of the assets here.

(2) The relevant facts in *Local 50* and in the other cases referred to by the Second Circuit occurred prior to the enactment of the multiemployer pension plan amendments in 1980, which I think is a significant circumstance.

(3) Probably as important as any, there is now a provision of the statute which governs specifically situations in which the law would require a transfer. Essentially the point he is making here is that, based upon Section 302, the law requires a transfer. I think your argument is that the statute now tells us under what circumstances the law requires a transfer and, to the extent it is a specific statute governing that, general arguments based upon an expansive reading of Section 302 are no longer permissible or necessary. Correct?

MR. ROSE: That is correct.

THE COURT: I think that is what you were going to tell me. We can shortcircuit this.

MR. ROSE: I couldn't have said it better, your Honor. It reminds me of a comment, if I may paraphrase a comment of the Court earlier this morning in connection with another case. The Second Circuit would not have so decided *Local 50* on the present record in this case.

[6] THE COURT: ~~I don't think~~ they would have. That is why I don't regard it as dispositive. But if I am wrong, they can tell me. I think you have the better of the argument. That is why I would like to hear from him.

MR. SULDS: Thank you, Judge.

MR. ROSE: I do have some more material I would like to share with you.

THE COURT: The matter is fully briefed. Is there anything new that is not encompassed by what I have already said?

MR. ROSE: It may be encompassed but not in particularity.

THE COURT: I know, but we can't go on forever. One of the problems I had with your papers is that they just seem to go on and on. There are very precise, narrow issues here. As I understand your argument, (1) *Local 50* is not dispositive for the reasons you have given and I have put on the record; (2) this structural defect argument, based upon the absence of a requirement in your plan providing for transfers, is circular and bootstrapping, because in a situation in which the law imposes the requirement of a transfer rather than the decision of the people transferring the assets themselves, that kind of provision is not necessary, and you cannot argue a structural defect in a plan because it doesn't have a [7] provision which deals with transfers imposed by law as opposed to by the plan itself. I have no difficulty with any of those arguments. I think you have the better of them.

To the extent that *Robinson* said I should now look into the reasonableness of a collective bargaining agreement, I don't have to even reach the standing questions, and I am not so sure I accept all of your arguments on standing, because I think the issue of standing with respect to all three of these people is not all that clear.

I am not going to decide this case on lack of standing. I am going to decide this case on the merits. I think I should read the merits of this case. To decide it on standing will only lead to one more appeal if the Court of Appeals disagrees with that. I am going to reach the merits of the case. I don't find your standing arguments persuasive, because I think an argument could be made that each one of these three people has standing. I don't think the standing rules are quite as limited as you think they are.

In any event, if I were to decide the case on standing and be wrong in that determination, we would be back here having the Court of Appeals telling me to decide

it on the merits. So I would just as soon deal with the [8] merits now.

I think you have some good arguments that *Robinson* said that, if it is reasonable and if it is not clearly in violation of the law, the Court may not interfere. However, if a collective bargaining agreement allows for the transfer of assets under a situation where ERISA does not permit that to happen, then nothing in *Robinson* would foreclose me from finding that provision of the collective bargaining agreement to be invalid. But you say that is not true here because there is not a clear violation.

MR. ROSE: That is correct. Just one thing in connection with your description of *Robinson*. *Robinson* says if it is a collectively bargained provision, it isn't even tested by reasonableness.

THE COURT: I understand that. But if the collective bargaining agreement allowed them to transfer assets under circumstances which the statute did not permit, I don't think I would be barred by *Robinson* from having jurisdiction to examine the deviation of the collective bargaining provision from the statute. The only argument we are having here is that he says Section 302 makes this a violation of the statute based upon *Local 50*—

MR. SULDS: Judge, it is not the only argument, if I may.

THE COURT: The main argument that you have.

[9] MR. SULDS: No, I don't think that is right.

THE COURT: Then you are going to lose.

MR. SULDS: No, I don't think that is right.

THE COURT: Then why don't we hear from you. What arguments do you have other than that? Let's start there.

MR. SULDS: If I may, I am Jon Sulds from Gibson, Dunn & Crutcher.

THE COURT: If you have other arguments, tell me what they are first.

MR. SULDS: The argument that I think becomes a fulcrum for understanding why Mr. Rose is wrong and your initial reaction to the case needs to be rethought revolves about Section 1414 of ERISA. That is an entirely mandatory provision of the statute which obliges these defendant funds to have in place asset transfer rules. It says "shall." It is mandatory. It doesn't get—

THE COURT: Wait, wait. Where they are going to transfer assets.

MR. SULDS: No, no. They have to have them in place. No, sir. Let me read to you now from *Vornado*, the most recent case on the subject. I am reading from 829 F.2d at 418. There were two parts to the *Vornado* case. First, when *Vornado*—

THE COURT: Let me ask another, more basic [10] question. Even if I were to accept your esoteric argument—

MR. SULDS: It is not esoteric here.

THE COURT: Even if I were to accept your esoteric argument that the statute requires them to have transfer rules, their failure to have transfer rules would not get you the relief you want.

MR. SULDS: Well, it might on a second tier. And the fact is—

THE COURT: How?

MR. SULDS: Because the asset transfer rules would click in, because we have assumed the liabilities. The asset transfer rules would also demonstrate to you that there is nothing whatever inconsistent between the holding in *Local 50*, 302(c), and 1414. There is no inconsistency here.

THE COURT: Suppose they had asset transfer rules, how would that entitle you to have the assets transferred?

MR. SULDS: We have taken the liabilities. Let me just read to you—

THE COURT: That isn't true, from what he says.

MR. SULDS: But it is absolutely true.

THE COURT: What if these people leave you and go to work for some other employer who is covered by their fund?

[11] MR. SULDS: Judge, we have liabilities with respect to them, just like any of the folks that they have currently covered now. If those folks leave them and go some place else, they lose the liabilities. If the folks we have leave us and go some place else—

THE COURT: That is not the kind of loss of liability that the regulations say require a transfer.

MR. SULDS: I think it is exactly.

THE COURT: I have your argument. I don't accept it. Go to your next argument.

MR. SULDS: Judge, you started from the premise that there is no requirement under the law for mandatory asset transfer rules. That is flatly contradicted by *Vornado*.

THE COURT: I will look at the *Vornado* case.

MR. SULDS: Let me refer you to 418, 29 F.2d, "Discovering that the fund had not yet adopted rules governing the transfer of assets, as required by ERISA, 29 U.S.C. 1414(a), *Vornado* brought suit in the District Court to compel the fund to do so. The District Court concluded that the trustees had a duty to comply with this provision of the statute, and the fund responded by adopting rules in April 1984."

THE COURT: What has that to do with this case? Have you brought an action compelling them to adopt rules [12] governing the transfer of assets?

MR. SULDS: Absolutely.

THE COURT: No, you are asking for the transfer of assets, not the adoption of transfer rules.

MR. SULDS: We have asked them all along. We have asked them all along to adopt them. They haven't. That is the third claim that we make.

THE COURT: But I am saying, does that get to the question of standing?

MR. SULDS: Does it?

THE COURT: Your question of standing becomes much more difficult if you are a nonparticipant in the plan or a nonfiduciary of the plan and you are seeking to have them adopt transfer rules.

MR. SULDS: As a minimum, Judge—

THE COURT: Is that claim in your complaint, and if so, where is it?

MR. SULDS: It is the third claim.

THE COURT: You are seeking to have them adopt transfer rules?

MR. SULDS: That's correct.

THE COURT: I think that one I probably will dismiss for lack of standing.

MR. SULDS: Let me ask you a question, if I may, with respect to that.

[13] THE COURT: Because you are not in any way aggrieved by the lack of transfer rules.

MR. SULDS: They say we haven't picked up liabilities because these folks may come back. Therefore, by definition, these folks are participants. They can't have it both ways. Either some of my plaintiffs are participants for purposes of compelling the adoption of asset transfer rules—

THE COURT: That is not correct. They will become participants when they become eligible to participate in the plan again.

MR. SULDS: Judge, you are faced with a very clear violation of law here.

THE COURT: I am not. You think it is clear; I don't think it is so clear. What I am saying is, even if you are correct and the law requires them to adopt transfer rules, and let's assume you have standing to bring that claim, then the only relief that you are entitled to is to have me direct them to transfer the assets.

MR. SULDS: That's correct.

THE COURT: But then I don't think anybody can complain about the lack of transfer rules, unless they can demonstrate that they would be a party aggrieved by

the lack of transfer rules. Then you would have to demonstrate to me that whatever transfer rules they adopted would [14] require them to transfer these assets to you. So, in the absence of any requirement of the transfer of the assets to your fund, nobody would be aggrieved by the failure to adopt transfer rules.

MR. SULDS: Judge, if I could just have a couple of minutes, because I believe that—

THE COURT: Then we will deal with the disqualification motions later.

MR. SULDS: I don't think that there is one that is here.

THE COURT: They have raised it in their papers.

MR. SULDS: They have raised it in their papers but they haven't made it. If you think there is any issue with respect to that, then I should not be making this argument.

THE COURT: Maybe not. You put in an affidavit based upon personal knowledge. If I grant a summary judgment, then there is no problem.

MR. SULDS: And if you don't grant summary judgment, I have no intention of representing my plaintiffs.

THE COURT: Then for the moment I don't have to deal with that. Go ahead.

MR. SULDS: Among other things, if I may just address that, I put in an affidavit on personal knowledge in April and the question of disqualification wasn't raised [15] until the tail end of all of this, without a chance to respond.

THE COURT: I don't know that that is a waiver. But they haven't made a formal motion yet.

MR. SULDS: So I don't know what I have to address.

THE COURT: I don't have any problem with your arguing the case so long as we don't reach a situation where there is going to be a trial at which your testimony becomes necessary.

MR. SULDS: Judge, the minute it appears to you in the course of this case that I may have to testify regard-

ing what happened in a collective bargaining session, I am out of the case. That is absolutely plain.

THE COURT: If your argument is that you have a claim based upon their failure to adopt transfer rules, tell me how their failure to adopt those transfer rules has aggrieved either the trustees or any employee or the employer or the three plaintiffs here.

MR. SULDS: Let me start with the plaintiff employees with respect to that. Let me, if I may, just kind of sketch out for you what is involved in terms of what was picked up on the Southern side and what—

THE COURT: I know that; I read the papers. Answer my question.

[16] MR. SULDS: I think that is part of an answer to the question.

THE COURT: Go ahead and answer it.

MR. SULDS: With respect to the employees in the welfare situation, welfare funds right now, as you may well be aware, are running a negative cash flow situation. The Southern Fund experienced that and has had recently to change significantly what the nature of the benefits was.

So far as I understand the financing of the Southern Fund, had it had its aliquot share of the reserves, which I think *Local 50* teaches it had the right to have, that might not have happened.

THE COURT: You agreed in the collective bargaining agreement.

MR. SULDS: It is a three-year agreement, Judge. It is over now.

THE COURT: It is over now?

MR. SULDS: The three-year agreement has lapsed. There is new collective bargaining which has superseded that.

THE COURT: Is there a new agreement in effect?

MR. SULDS: No, it is still in the process of being hammered out.

THE COURT: Under the law, the old one is in effect until the new one replaces it.

[17] MR. SULDS: Except that we reached an impasse.

THE COURT: That may be, but some of your employees may decide to go to work for someone else and the solution will be academic.

MR. SULDS: You have asked me how the employees were harmed by not having a portion of moneys contributed on their behalf. What I am trying to tell you is because the Southern Funds didn't have sufficient reserves to continue one form of benefit, it was dropped. It was dropped across the table, it was dropped after collective bargaining, and it was dropped in the context of trustee discussions. That is one way.

Now, the potential for that happening—

THE COURT: But that injury results from the fact that the employer chose to set up his own fund and the union allowed you to do that.

MR. SULDS: Agreed. Just like in *Alvares*, which is so significant to the *Local 50* discussion.

THE COURT: But you are not aggrieved by their failure to set up transfer rules.

MR. SULDS: Judge, just let me ask—

THE COURT: How are the employees aggrieved by the failure to set up transfer rules?

MR. SULDS: They are aggrieved because moneys that were contributed on their behalf—

[18] THE COURT: Maybe you are not listening to what I am saying. Wherein does the failure to set up transfer rules connect to the obligation to transfer the funds?

MR. SULDS: Once the liabilities are transferred, as they have here—the Welfare Fund of Greater New York no longer provides welfare coverage. The Pension Plan of Greater New York no longer accrues service credit. Those are all liability questions.

THE COURT: What in the law would require them to set up a transfer rule—

MR. SULDS: Section 1414 of ERISA. It says they shall have those rules. That is what *Vornado* says, that you have a right to bring a lawsuit to compel them to do it.

THE COURT: Where in Section 1414 does it say that the transfer rules that they are obliged to set up would require them to transfer these funds? I missed it.

MR. SULDS: It does not say that it would require them to transfer the funds.

THE COURT: That is what I am asking about.

MR. SULDS: Excuse me. What it says, Judge Sprizzo, is, they shall have transfer rules such that assets shall follow liabilities. The issue in *Vornado* didn't have anything to do, as Mr. Rose has suggested, with whether or not there would be a transfer of liabilities. To the contrary—

[19] THE COURT: What about Section 1415? What is that designed for?

MR. SULDS: That has a mandatory triggering effect on the transfer of assets in one limited situation. It does not talk to the other situations, any one of a number of which are imaginable and one of which is presented in this case.

THE COURT: Is there any case authority for the proposition that ERISA, either Section 1414 or Section 1415, requires transfer rules directing a transfer of liabilities under the circumstances present in this case?

MR. SULDS: I think, fairly read, that is exactly what the *Vornado* case stands for.

THE COURT: I will look at the *Vornado* case, but *Local 50* doesn't deal with that.

MR. SULDS: No, it doesn't. It clearly doesn't, except to one extent Judge, and if I can come back to that—

THE COURT: Did *Vornado* say they have no obligation to set up transfer rules?

MR. SULDS: I think if you read the *Vornado* case there were two steps. First, they brought a suit to have the asset transfer rules, and then there were asset transfer rules which limited transfers to 10 percent. *Vornado* was about a 75 percent contributor and said, "Hey, we don't want to take 75 percent of the liabilities and get [20] 10 percent of the assets," so they brought an action.

THE COURT: What kind of liabilities did *Vornado* assume?

MR. SULDS: It didn't assume any. That is the difference between that case and this. That is why that case doesn't teach us as much about this, except for the need to have transfer rules. *Vornado* said we are not going to take the liabilities unless we get a commensurate share of the assets.

THE COURT: Is that a voluntary transfer situation?

MR. SULDS: I think it was, because it didn't happen pursuant to collective bargaining. It didn't happen pursuant to collective bargaining at all. They went out of business.

THE COURT: It wasn't required by law.

MR. SULDS: That is correct.

THE COURT: Is there a case that says there is an obligation to set up transfer rules in situations—

MR. SULDS: Yes, *Local 50* says that specifically. Judge, you asked me if there is a case.

THE COURT: Is there a case which says that this statute, the one you are relying upon—

MR. SULDS: No.

THE COURT: —requires the setting up of [21] transfer rules where the transfer is required not by agreement or by decision of the parties but by law? There is something circular in saying that the law requires a transfer, therefore they should have transfer rules, when no one knows they have an obligation to set up transfer rules until some court tells them that they require it.

MR. SULDS: You are wrong on that. Look at 1414 to check me on that. The law says they shall have them. That covers any and all eventualities.

THE COURT: They shall have them even if they don't need them?

MR. SULDS: Even if they don't need them. It is a structural defect for them not to have those rules in effect, precisely because Congress couldn't envision all the reasons they would be necessary.

THE COURT: None of your parties are aggrieved by the failure to set up those rules. You all lack standing unless you can make that connection between the transfer rules that they should have set up and the transfer of the assets. That is the bottom line here.

MR. SULDS: Let me approach it this way, from the point of view of a participant in the fund, former participant in the fund. Section 1451 has this aggrieved notion, which is the basis on which some of our cases are brought.

[22] THE COURT: That is a general concept of standing.

MR. SULDS: It is. And the concept of standing, by the way, as you correctly noted, is a question of who gets in the courthouse door, who presents the case or controversy as such. So you are not going to issue an advisory opinion. You are not going to issue an advisory opinion in this case; that is quite clear. There are real disputed issues here.

THE COURT: But the question is whether or not the parties who are raising them have standing to raise those issues. In other words, if I grant you the relief which you claim you are entitled to, to wit, I directed the setting up of transfer rules, you have to demonstrate to me that that would in some way benefit you, and that is the connection you haven't made.

MR. SULDS: It will benefit everybody who is a plaintiff in the following ways.

THE COURT: How? Tell me how.

MR. SULDS: The plaintiff employees now have within the benefit funds which exist for—

THE COURT: You are getting to the conclusions before you get to the reason. Tell me why the setting up of transfer rules—

MR. SULDS: Your Honor, with all due respect—

[23] THE COURT: Wait. You are not answering my question. If you don't do it shortly, I am going to terminate your argument. My question is, make the connection between the obligation to set up transfer rules and the obligation to transfer the funds. That is what I am asking about. Don't answer some other question.

MR. SULDS: I thought I was answering your question, your Honor.

THE COURT: No, you weren't. Try again.

MR. SULDS: I will try my best.

THE COURT: This will be your last chance.

MR. SULDS: Yes, sir.

THE COURT: Try again.

MR. SULDS: With respect to the plaintiff employees, they are aggrieved because moneys that were contributed on their behalf to the old funds for the purpose of making sure both that their pensions would be there and that their welfare coverage would be there, moneys that were, in effect, a bank against the future—remember, we are only talking about reserves here, we are not talking about the moneys necessary to fund the ongoing liabilities, we are talking about the reserves; we are talking about a bank, that the union representing these employees took and banked in those funds rather than putting them in their pockets as wages—those moneys are [24] no longer available to them to bank them for the future.

THE COURT: You are missing the point again. My question is, why would the law require them to set up transfer rules—

MR. SULDS: We have those liabilities.

THE COURT: —which would require them to transfer those funds to your fund?

MR. SULDS: Because we have the liabilities. We have the liabilities. The Southern Funds currently provide welfare coverage. The Southern Funds with respect to those employees who did not vest in Greater New York have granted past service credit for all Greater New York service, and are now, regardless of whether they get the reserves or not, going to pay pensions based on that. And also, Judge, if I may—

THE COURT: You have some liabilities. The question is, do you have their liabilities?

MR. SULDS: Yes, absolutely.

THE COURT: Where do you have their liabilities?

MR. SULDS: In the pension area, with respect to those individuals who with us have completed service beyond that of the ten-year vesting period. Every additional year, as you know, under the schedule calls for additional payment. We are paying that, not them. The service was with us.

[25] THE COURT: But that was never their liability to begin with.

MR. SULDS: Judge, it would have been their liability had they not come out. You talk about contingent—

THE COURT: That is like saying if somebody quits a job and goes to work somewhere else, they would have had a liability if he hadn't quit. The only liability they have under their plan is based upon services for people who are participants in their fund while they are working for an employer. Once they leave that employer's employ or get connected to some other fund, they never have that liability. Their liabilities for that employee are frozen by the dictates of their own plan. You have assumed a liability, yes. The question is, have you assumed their liability? And I think the answer is no.

MR. SULDS: The collective bargaining agreement that is involved in this case, attached to the complaint as Exhibit A, provides on page 16 that these funds, the Southern Funds, are going to be set up, that the Southern employers are going to cease making contributions into the Greater Fund, and I am quoting, "There shall be a

continuity of benefits for employees to be covered by the Local 144-Southern Funds." As a matter of—

THE COURT: What does "continuity" mean to you?

MR. SULDS: "Continuity" means to me an [26] assumption of liabilities of the precise nature that we have.

THE COURT: It means that their liability will go to point A in time and you will pick it up from there.

MR. SULDS: But the liability is not divisible as to point A and point B unless you divide the reserves. Reserves are accumulated in a fund not only to accumulate with respect to everybody who vests as of today, but also to pay for people who continue to acquire service credits and those who will vest in the future. Those two categories of people are people we picked up.

THE COURT: The collective bargaining agreement does not state to them that we will assume these liabilities on that basis if you transfer the reserves.

MR. SULDS: We have already said that. It is in the record before you, in the minutes of the employees.

THE COURT: Not in the collective bargaining agreement.

MR. SULDS: No, because it needed their agreement.

THE COURT: And you wouldn't have received it. Having failed to negotiate that as part of the collective bargaining agreement, you now come in and say the law requires it anyway.

MR. SULDS: No, Judge, that is not at all it.

[27] THE COURT: It is pretty close.

MR. SULDS: No, I don't think so at all.

Let me return to the transfer of liabilities and transfer of assets definition you had before, and let me read further from where you were. "However, the shifting of assets and liabilities pursuant to a written reciprocity agreement"—exactly what you are saying we should have —"between two multiemployer plans in which one plan assumes liabilities of another plan is not a transfer of assets and liabilities."

THE COURT: That cuts your throat.

MR. SULDS: I don't think so.

THE COURT: If it doesn't apply in a situation in which there is a reciprocal exchange of obligations, how could it possibly apply when there is not?

MR. SULDS: The point is that where there is no reciprocal agreement, there is a requirement of having asset transfer rules. That is what this definition says. Funds can do anything they want between themselves. That is not governed by the 1414 law.

THE COURT: But the other prong of your argument is that you assume their liabilities. If I reject that, you are out of court; is that correct? If I reject your argument that you have assumed their liabilities, not your own liabilities, you are out of court; right?

[28] MR. SULDS: I think you are probably right, Judge.

THE COURT: And I think I reject the argument, but I will think about it. I will look at *Vornado*.

Do you have anything else you want to tell me?

MR. SULDS: Yes, I would like to come back—

THE COURT: You have five more minutes to finish up.

MR. SULDS: I will take about two. I am sorry I am so long.

I just want to call your Honor's attention to a provision or part of the *Local 50* case. You seemed, when you came on the bench, to have concluded *Robinson* didn't apply. I don't know what else you had in mind with respect to my—

THE COURT: My problem was, I didn't understand why people were arguing *Robinson* when there did not appear to be any argument made that the collective bargaining was unreasonable.

MR. SULDS: It seemed to me, as I listened to Mr. Rose's argument, that you got into this notion that there was something that we were trying to grab that wasn't ours, and there was something improper or that we didn't

have a good claim, because of the notion that 302 and *Local 50* were inconsistent with ERISA.

[29] THE COURT: I said I am not sure they are inconsistent.

MR. SULDS: I think that that is the point. When you put together, Judge—

THE COURT: The only inconsistency may be the suggestion in *Local 50* that the funds paid by one employer may never be used for the benefit of employees other than its own. That is the one thing which may create the inconsistency, and I think the Second Circuit statement to that effect was well beyond what the case warranted, nor was it anything more than dictum in the context of that case.

MR. SULDS: I would like to read to you, if I may, what I think part of the holding of *Local 50* is—

THE COURT: Don't read it to me. I read it yesterday.

MR. SULDS: But it just has to do with the notion that the structural defect that they are talking about is the failure of the fund there to have a provision requiring transfers of assets under those circumstances.

THE COURT: But that is circular. Once they find—

MR. SULDS: But it is why there is no inconsistency with 1414.

THE COURT: *Local 50* does not deal with your [30] other argument, which is that the statute requires them to have a transfer rule, because that was not even involved.

MR. SULDS: There is no inconsistency. Quite to the contrary, they are completely consistent.

THE COURT: If I don't find an obligation to transfer the funds under the statute, then there would be no structural defect in the plan.

MR. SULDS: As I thought of it standing up here, Judge, I think that if you conclude that these Southern Funds have no liabilities which previously were those of the Greater New York Funds, that regardless of the

structural defect of not having the asset transfer rules, you are right, we are out of court.

THE COURT: That is what I have been trying to say.

MR. SULDS: I did not understand what you were saying before.

THE COURT: I thought you didn't understand what I was asking you.

MR. SULDS: It may take me a long time.

THE COURT: All I am saying to you is that if there is no obligation to transfer the funds, then there is no structural defect in the plan, number one—

MR. SULDS: There continues to be a structural defect.

[31] THE COURT: Not unless there is an obligation to transfer the funds.

MR. SULDS: I am sorry, I am thinking of the 1414 rule structure defect.

THE COURT: If there is no requirement that they transfer the funds under Section 302(c)(5), there would be no structural defect in the plan of the type that the Court of Appeals found in *Local 50*. If there is no obligation to transfer the funds, then any failure to comply with Section 1414 by having a transfer rule would not have in any way aggrieved these parties. In other words, your standing depends upon the obligation to transfer the funds. So I say the same issue cuts across both.

MR. SULDS: I think what you are saying is that the standing depends on whether the Southern Funds in fact have assumed the liabilities, because if they have, then everything falls back into place.

THE COURT: It depends upon whether there is an obligation to transfer the funds.

MR. SULDS: One follows from the other, as I understand what you are saying.

THE COURT: You say the fact that they have assumed the liabilities requires them to transfer the funds. I agree with that. If they have an obligation to transfer the funds, then the failure to set up transfer rules which [32] would require the transfer of the reserves would

aggrieve your parties. I don't have any problem with that.

MR. SULDS: Judge Sprizzo, you have been very patient, but one more—

THE COURT: The bottom line is: If there is no legal obligation to transfer these funds or these reserves to you or to your fund, then there isn't any ERISA violation here, there isn't any *Local 50* violation here, there isn't anyone aggrieved.

MR. SULDS: I think that *Local 50* creates the obligation to transfer the funds. I am not arguing with that.

MR. SULDS: And I think, from what you were saying, you and I are saying the same thing. That is, to the extent the Southern Funds have picked up those liabilities, there then becomes an obligation to have had asset transfer rules.

THE COURT: The failure to have transfer rules has no impact unless they have to transfer the reserves to you.

There is only one portion of their argument that I want you to respond to, which is that the transfer of these reserves to you would put them in violation of ERISA, and they would then be giving the benefits of the fund to people other than plan participants, which they say the law [33] forbids. That is their argument.

MR. SULDS: It is a good argument if we don't have liabilities. It all turns, doesn't it, Judge, on whether or not these Southern Funds picked up plan liabilities from Greater New York. If we picked up plan liabilities, then the transfer of assets is going to follow those liabilities. Remember, this is going to be held in trust pursuant to 302. It is not as though employers are going to grab it and put it in their pockets.

If there are liabilities that have come to my side of the table, then they are wrong. If there are no liabilities that have come to my side of the table, then they are right. So if I may just take one minute with respect to the liability question, Judge, because, as we discuss it here, it seems to me that the fulcrum on which your decision

is going to turn is going to be whether or not the Southern Funds had adequately picked up liabilities to the extent that it triggers all the rest.

THE COURT: Their liabilities.

MR. SULDS: Their liabilities, their liabilities. There are three types of liabilities that were involved in the Greater New York situation. One was welfare liabilities. They had an obligation to continue providing welfare coverage to those employees in covered employment. The employees involved in this case, the Southern New York [34] employees, now have their welfare coverage provided under the Southern Welfare Plan. They didn't say anything about that. Their collective bargaining agent took them from one plan to another. That was what the agreement was. That agreement is in front of you. There is a dispute, to be sure, about how that agreement came to be made, but the agreement is in front of you, and the agreement says you are going to cease making contributions into Greater New York and you are going to make them into Southern New York. And it says that in the context of a continuity of liabilities.

THE COURT: But the fund never had any liability for welfare benefits for people after they left the fund.

MR. SULDS: But the way in which they left the fund was the product of collective bargaining, Judge, and therefore the collective bargaining occasioned the assumption by Southern New York of the liability to provide the welfare coverage.

THE COURT: But you insisted on going to another fund. You could have stayed in the same fund.

MR. SULDS: The union agreed with us.

THE COURT: But it was not their suggestion; it was yours. In fact, the union was very clear—

MR. SULDS: There are reserves—

THE COURT: No, no. What the union bargained [35] for was, if they were going to agree to your demand that you have your own fund, that that new fund not prejudice the employees because those benefits should be

at a level commensurate with those provided by the old fund. But nothing in that suggests that this fund has any liability whatsoever with respect to people who leave the fund.

MR. SULDS: Judge, the one thing that I don't understand in your approach to the case—and I am an advocate and maybe I am being intentionally obtuse, I don't think so—is this.

THE COURT: Is it better to be intentionally obtuse or unintentionally obtuse?

MR. SULDS: At least, before you thought I was unintentionally obtuse, so now I am giving myself the benefit of the doubt. On top of that, obtuseness is not what I had in mind today. We had the Greater New York Fund, and they contain within their corpus, within their reserves, substantial sums of money contributed by Southern employers on behalf of Southern employees. They have no continuing obligations to those Southern employees, except with respect to those Southern employees who service enough time under the Greater Funds to have vested.

THE COURT: Or come back.

MR. SULDS: No. You know, it is three years. There is a break in service law that has to apply somewhere.

[36] THE COURT: If they go back and work for an employer—

MR. SULDS: It has not been attacked, as far as I understand, the break in service rules.

THE COURT: If your welfare benefits get small enough, these people will leave you and work elsewhere.

MR. SULDS: They may do that, but we still are going to have a collective bargaining relationship with the union.

THE COURT: If your welfare benefits are less than other employers provide, they are going to work for another employer.

MR. SULDS: Judge, you may know more about it than I do. We haven't dropped off anybody in terms of employment yet. Maybe it will happen.

THE COURT: Have you cut back on their welfare benefits yet?

MR. SULDS: I just told you that we have had to change the whole configuration. We now have a co-pay option with respect to it.

THE COURT: You reached an impasse on that.

MR. SULDS: The trustees put into place a new welfare plan, which has a co-pay option with respect to some coverage that was previously fully funded with the plan.

[37] THE COURT: So if any employee doesn't like that, they can go work elsewhere.

MR. SULDS: Maybe so. I don't know. But the thing that seems to me to be the principle upon which *Local 50* is focused, upon which *Alvares* is focused, and the other cases in this area, and the reason that 1414 of ERISA mandates that there shall be asset transfer rules, is that it is improper, once the contributions in a global kind of sense—I can't give you a case on this, this is a feeling—it is improper, once these contributions have been made, to let them stay over here where, in the banking concept, they properly belong where the benefits are being provided. That is what this case is all about. It is this banking concept. It is reserves, Judge.

THE COURT: If that banking concept is adopted, that is the end of multiemployer funds.

MR. SULDS: How?

THE COURT: Because every time one employer decides to set up his own fund, you have a fragmentation of funds. I think he has an argument that Congress spent a lot of time addressing the problems of multiemployer funds. They put in a withdrawal liability provision, they put in a lot of provisions dealing with the regulation of multiemployer funds.

MR. SULDS: Including 1414.

[38] THE COURT: And I would think there was something in the legislative history that would indicate that when one employer leaves a fund and sets up his own bargaining unit and his own fund, Congress might have dealt with that.

MR. SULDS: Judge, I contend that 1414 is the catch-all under ERISA designed to deal with that. The legislative history we have cited to you. I would like to just underscore that it is real official legislative history.

THE COURT: If they have provided in 1415 for a mandatory transfer of funds where the collective bargaining did not extend the other situation—

MR. SULDS: It was because of the need to dovetail it with requirements under the Taft-Hartley Act. You could not, under 302, continue to be making contributions to one multiemployer fund where the employees were not represented by that labor organization any longer.

THE COURT: But why require a transfer of assets?

MR. SULDS: Because it was necessary as a result of 302. The two statutes have to be read in harmony.

THE COURT: Congress passed 1415 because 302 required it?

MR. SULDS: I believe that's right.

THE COURT: Then it is—

[39] MR. SULDS: And that brings the harmony to *Local 50*.

THE COURT: Your argument is that 302 requires more than 1415 requires. You are saying to me that 1415 is there because you want to effectuate 302, which doesn't make any sense.

MR. SULDS: Judge, you can distinguish *Local 50* as they have attempted to do on the facts that that involved decertification and this involves collective bargaining. I suggest to you that if that is what the Second Circuit had in mind, it would not have so heavily relied upon *Alvares*, which is the same case as this, the Ninth Circuit case. I mean, that seems to me the hard case here from their point of view.

THE COURT: *Local 50* did not require a situation where the transfer of the assets might put them in violation of ERISA, because the funds would be put to the benefit of the employer, not the employees.

MR. SULDS: But no employer can have the benefit of these funds under the relief we seek.

THE COURT: Certainly, if I relieve your obligation with respect to what you agreed to do—

MR. SULDS: Any time there is a change in what the contribution rate is, whether it is up or down, it is the product of collective bargaining.

[40] THE COURT: We have fully explored this. We have been here for an hour and five minutes. One brief rebuttal, one minute.

MR. ROSE: I note that counsel said we assumed the liabilities. None of the plaintiffs assumed any of the liabilities. Southern Funds aren't even parties here.

MR. SULDS: I misspoke myself.

MR. ROSE: I would urge the Court—

THE COURT: Southern Fund is not a party here? The trustees represent the fund, don't they?

MR. ROSE: No, they do not represent the funds. That is quite clear in the record of this case. The funds have not voted to become parties in this case.

MR. SULDS: That is the management trustees. I don't represent the union trustees.

MR. ROSE: That's right, he does not represent the fund at all in this case. I would urge the Court—

THE COURT: Nobody has assumed any liabilities. But that doesn't affect anything.

MR. ROSE: As a matter of fact, your Honor, in the case of the pension plan, there was over a year's hiatus between the time that they withdrew from the Greater New York Pension Fund and established their own. They didn't establish—

THE COURT: But if there was an assumption of [41] liabilities, the fact that they have not joined the

action doesn't affect anything. Either the law requires a transfer or it doesn't.

MR. ROSE: I had material I think is very important, but—

THE COURT: Let me just tell you, before you do that, that with respect to the summary judgment motions as to the counterclaims, I am going to deny those motions. I think there are factual issues to be resolved as to what the extent of the liabilities is. They claim they haven't had an audit. Those motions are all going to be denied.

With respect to intervention, I don't think intervention is authorized under the statute in a situation such as this. If you want to bring a separate action and consolidate it, you can. I don't think intervention is appropriate.

MR. ROSE: Let me mention something in connection with the counterclaims, if I may. I haven't been heard on that. Your Honor has already—

THE COURT: I read the papers. I don't need argument. I say I think there are factual issues; I can't grant summary judgment. The extent of the liability on the counterclaims, how much is owed, I think I can deny on the motion papers I now have. I am denying those motions without prejudice.

[42] MR. ROSE: We said in our papers you can't determine the exact amounts. That is why we suggested reference to a magistrate.

THE COURT: Why refer it to a magistrate? I can resolve it.

MR. ROSE: But on the issue of liability, your Honor, you have already issued an order defaulting them.

THE COURT: There is no question they are liable for the payments, but they dispute the amount.

MR. ROSE: That is correct. And all we ask is that it be referred—

THE COURT: Entering a judgment on liability doesn't get anybody anywhere. We just have to compute the amount.

MR. ROSE: I think it does. It gets us to the point—

THE COURT: It is academic, isn't it?

MR. ROSE: No, I don't think so, your Honor.

THE COURT: You can't get a judgment on it. What is the point of a judgment saying they are liable? They admit liability for the payment. They dispute the amount. Isn't that clear?

MR. ROSE: Your Honor, it makes a big difference—

THE COURT: You don't dispute your obligation—

MR. SULDS: To the extent that they arose under [43] the collective bargaining agreement. I don't know from the papers, and I don't think you can know, whether there are any periods that are claimed after the impasse occurred which would be the subject of ERISA.

THE COURT: We will have discovery on that.

MR. SULDS: We haven't had discovery.

THE COURT: Come back to me later. For the moment I am denying it without prejudice.

MR. ROSE: There is no claim here, your Honor, of lack of liability.

THE COURT: He is now saying he doesn't dispute liability for any payments which accrued while the collective bargaining agreement was in effect. He just doesn't know that the moneys you are claiming are within that category. Let's have discovery on that question.

MR. SULDS: And as to the amounts as well, your Honor.

THE COURT: That's right. Then we will resolve that later. There is no reason to resolve it now. Intervention is not appropriate on behalf of the person against whom he discontinued, because that claim is not common to any issues raised by the motions in front of me. If they want to bring a separate action, they can. I don't think it is a case I can consolidate. The factual predicate for the intervening parties' claim for funds is [44] totally separate and apart from any issues I am resolving in this case.

MR. ROSE: Your Honor, let me point out, the only reason we had an intervention situation in here at all is because the plaintiffs—

THE COURT: Sued you.

MR. ROSE: Wait a minute. —sued us in connection with three multi—

THE COURT: What I am saying is, they are permissive counterclaims; they are not compulsory counterclaims. I think that is clear. Once the plaintiff discontinues against that person as a defendant, any basis for the exercise of jurisdiction over permissive counterclaims disappears. Intervention is not an appropriate way to get a permissive counterclaim back before the Court, because by its very definition a permissive counterclaim does not come out of the factual core which is before the Court to begin with. A defendant is allowed to put it in because a defendant is allowed to put in any claim, whether it arises from the transaction or not, as a permissive counterclaim. But a permissive counterclaim does not arise out of the transaction sued upon; therefore it is not an appropriate subject for intervention. There is no reason why you can't bring a separate suit for that. Go right ahead.

[45] MR. ROSE: May I use a minute to rebut the main argument?

THE COURT: Yes.

MR. ROSE: I would urge the Court to read two affidavits that are in the record, one by Professor Dan McGill, the outstanding scholar in pension matters in this country, who is at the Wharton School of Finance, and the other affidavit I would urge the Court to read carefully is that of Mr. Higgs, who is an officer of the Martin Siegel (sic) & Company. That is the company that is the pension consultant to more multiemployer plans than anybody else. In fact, the multiemployer plans they are consultant to are about half of the participants in all of the multiemployer plans in the country. And he explains very carefully there why it would undermine on insur-

ance principles to allow money to go to a withdrawing employer back from a fund.

Furthermore, there is a nice—

THE COURT: It doesn't have anything to do with the law.

MR. ROSE: But it tells how this fund actually works.

THE COURT: I understand that. The fact that it would undermine insurance principles, etc., is not particularly relevant to the question of whether the law requires it.

MR. ROSE: In this sense it is, your Honor, and [46] I would suggest it is very important: Congress was aware that this is the way multiemployer plans work when they legislated, and they did it with that backdrop. The legislative history is clear that that is so.

THE COURT: I will reserve decision, look at the *Vornado* case, and write an opinion. Your papers may be long, but the bottom line is very simple: either Section 302 forbids an employer fund from using funds contributed by one employer for the benefit of employees of other employers or it does not. If it does, then the retention of these reserves would be in violation of that statute.

The second question is whether or not any obligation to use the funds for that purpose, and under the case law in *Alvares* that says you measure it not just at the time of the establishment but later, has been overridden by the comprehensive regulatory scheme set forth in ERISA, and whether or not, in view of the statute as it now exists, Section 302 can be read to imply an obligation to transfer these reserves under circumstances in which, you argue, the transfer of these reserves would itself be in violation of ERISA, since it would give the benefit of reserves to people who are not plan participants. I think that is a good argument and I will consider it.

The third aspect of this case is whether or not, under the multiemployer act, the statute requires you to [47] set up transfer rules and, had you set up those transfer

rules, whether you would have been obligated to set up transfer rules which would require you to transfer these funds. If you were not obligated to set up transfer rules which would have required you to transfer these funds, then nobody suing here would be aggrieved by your failure to set up transfer rules and you would lack standing to raise that issue. The issue of whether you have an obligation to set up transfer fund rules which would require the transfer of these funds is going to turn upon whether, under the statute, there has been an assumption of liabilities which would trigger your obligation to set up transfer rules. That is as simple as I can make it.

I have a grasp of the issues, and I will reserve decision on it.

MR. SULDS: Thank you for your time, Judge.

MR. ROSE: Thank you.

THE COURT: I think it is an interesting case, but, however I resolve it, the Second Circuit will get another crack at it. I think for the moment you have the better of the arguments. I may change my mind when I look at these cases.

MR. SULDS: I certainly hope so.

THE COURT: Have a good day.

Exhibit 1

Defendants' First Set of Interrogatories and Request for Production of Documents

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

DEFENDANTS' FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS

Defendants, by their undersigned counsel, direct this First Set of Interrogatories and Request for Production of Documents ("Interrogatories") to plaintiffs. The interrogatories are to be answered, and documents produced, in accordance with the applicable Federal Rules of Civil Procedure and Rules of Civil Procedure for the Eastern and Southern Districts of New York.

The documents requested are to be produced for inspection and copying at 10 a.m. on February 9, 1987 at the offices of Epstein Becker Borsody & Green, P.C., 1140 19th Street, N.W., Washington, D.C. 20036, or, in the alternative, plaintiffs may, on or before February 9, 1987, provide true copies of the requested documents to defendants' counsel.

The Interrogatories shall be deemed continuing, thus requiring plaintiffs to supplement their responses promptly upon acquisition of additional information, as required by Federal Rules of Civil Procedure 26(e).

The Interrogatories are to be answered in accordance with the DEFINITIONS, numbers 1 through 4 inclusive

set forth at page 2 and in accordance with the INSTRUCTIONS set forth at pages 3 through 5 inclusive.

DEFINITIONS

1. "Documents" refers to the following materials whether or not within the possession, custody or control of the defendants:

(a) Writings or printed matter of every kind and description including, but not limited to, memoranda, correspondence, photographs, drawings, blueprints, graphs, charts, telegrams, letters, contracts, diaries, notes, literatures and minutes, as well as drafts, copies, transcripts and summaries of any of the foregoing; and

(b) Recordings and all other nonwritten forms including, but not limited to, tapes, disks and other data compilation, mechanical or otherwise.

2. "Person" refers to any individual, association, partnership, corporation, trust, governmental agency, or other entity.

3. "Employee" or "employees" refers to any present or former employee or employees.

4. "He" or "his" shall be read to refer, where applicable, to the feminine, "she" or "her."

INSTRUCTIONS

1. Where asked to identify an individual person, state that person's:

(a) Full name;

(b) Present or last known residence address; and

(c) Present or last known business address and position.

2. Where asked to identify an entity other than an individual person, state its:

(a) Full name; and

(b) Present or last known address.

3. Where asked to identify a document, include where applicable, the following information:

(a) The type of document, *i.e.*, letter, memorandum, note, etc.;

(b) The date that the document was prepared;

(c) The document's author(s) or the person(s) who prepared or compiled it;

(d) the person(s) to whom the document was addressed and sent;

(e) The document's present location and custodian;

(f) The disposition made of the document, if it was in your possession and control but is no longer; and

(g) The date that the document was destroyed, and the reasons therefore.

4. Where asked to identify a communication, include the following information:

(a) The manner of such communication, *i.e.*, oral, written, telephone call, etc.;

(b) The person or persons making each such communication;

(c) The person or persons to whom each such communication was made;

(d) All persons present at the time of each such communication;

(e) The date and time of such communication;

(f) The place where such communication was made or held; and

(g) The substance of each such communication.

5. If you object to an Interrogatory on the basis of privilege, state in detail the facts on which you base your objections.

6. The instructions and definitions which precede these Interrogatories are an integral part hereof, and information requested in each Interrogatory includes all information called for by reference to the instructions and definitions.

7. Whenever the word "identify" is used with reference to a person or a document identified in a previous answer, it shall be sufficient to state his, her or its name or title and refer to the answer in which he, she or it was previously identified.

8. Where applicable, information sought by an Interrogatory may be furnished by reference to another answer, but separate answers should be given in all cases, and Interrogatories should not be joined together and accorded a common answer.

9. Where exact information cannot be furnished, estimated information should be supplied to the best extent possible. Where estimated information is used, it should be so indicated and an explanation given as to the source and basis of the estimate.

INTERROGATORIES AND REQUESTS

1. Do the management trustees of the Local 144-Southern New York Residential Health Care Facilities Association Pension Fund ("Southern Pension Fund") and Local 144-Southern New York Residential Health Care Facilities Association Welfare Fund ("Southern Welfare Fund") (collectively "Southern Funds") named in paragraph 2 of the Third Amended Complaint represent either or both of the Southern Funds in this litigation? If the answer is yes:

a. Identify the documents, communications or any other actions by which one or both of the Southern Funds authorized such representation;

b. Provide all documents identified in (a).

2. Do the management trustees of the Southern Funds referred to in Interrogatory 1 assert, for purposes of this lawsuit, that they are fiduciaries of the Local 144 Nursing Home Pension Fund ("Greater New York Pension Fund") or the New York City Nursing Home-Local 144 Welfare Fund ("Greater New York Welfare Fund") (collectively, "Greater New York Funds")? If the answer is yes:

a. State the specific facts relied upon to establish their fiduciary status;

b. Provide all documents relied upon to establish their fiduciary status.

3. Do the plaintiffs referred to as "Employers" in paragraph 4 of the Third Amended Complaint assert, for purposes of this lawsuit, that they are fiduciaries of the Greater New York Pension Fund or the Greater New York Welfare Fund? If the answer is yes:

a. State the specific facts relied upon to establish their fiduciary status;

b. Provide the documents relied upon to establish their fiduciary status.

4. Do the plaintiffs referred to in paragraph 5 of the Third Amended Complaint assert, for purposes of this lawsuit, that they are fiduciaries of the Greater New York Pension Fund or the Greater New York Welfare Fund? If the answer is yes:

a. State the specific facts relied upon to establish their fiduciary status;

b. Provide the documents relied upon to establish their fiduciary status.

5. Referring to paragraph 21 of the Third Amended Complaint, and the example of "assumption of liabilities" given there, is the amount of benefits that the Greater New York Pension Fund is obligated to pay any different as a result of the Southern Pension Fund's "assumption of liabilities" than it would be without such assumption? If the answer is yes:

a. Identify the provisions of plan or trust documents, or of any other authority, that would obligate the Greater New York Pension Fund to make any payment on account of unvested benefits;

b. Provide the documents or portions of documents identified in (a).

6. Referring to paragraph 21 of the Third Amended Complaint, state the authority in ERISA or any other law under which funds held by the Greater New York Pension Fund are "attributable" to contributions made by particular employers, and the specific consequences that attach to "attributable" funds.

7. Referring to paragraph 22 of the Third Amended Complaint, state the authority in ERISA or any other law under which funds held by the Greater New York Welfare Fund are "attributable" to contributions made by particular employers, and the specific consequences that attach to "attributable" funds.

8. Referring to paragraphs 31, 36 and 45 of the Third Amended Complaint, state the authority in ERISA or any other law under which "corresponding liabilities" are assigned to certain contributions to a multiemployer plan, and the specific consequences that attach to "corresponding liabilities."

9. Referring to paragraph 21 and to paragraph 31, 36 and 45 of the Third Amended Complaint, state (i) what is the effect of the alleged "Southern Pension Fund's assumption of the Greater New York Pension Fund's

unvested liabilities for the past service credits of all participants in the Southern Funds" and (ii) what are the "corresponding liabilities" assumed by the Southern Pension Fund, in the following examples? Both examples deal with an unvested participant with nine years of service credit in the Greater New York Pension Fund who becomes a participant in the Southern Fund when his employer withdraws from the Greater New York Pension Fund and joins the Southern Pension Fund. Thereafter:

a. The employee leaves employment with the Southern employer without completing another year of service, is employed (beginning less than nine years after his last year of service in the Greater New York Pension Fund) for five years of service with an employer who contributes to the Greater New York Pension Fund, and then retires.

b. The employee continues employment and completes five years of service while the employer is a contributor to the Southern Pension Fund, then leaves that employment, is employed (beginning less than nine years after his last year of service in the Greater New York Pension Fund) for five years of service with an employer who contributes to the Greater New York Pension Fund, and then retires.

In both 9(a) and (b), the employee has 14 years of benefit credit in the Greater New York Pension Fund at retirement.

10. Has any claim for benefits made by an employee who is a plaintiff in this case for hours of service worked before April 1, 1984 or in the period May 16, 1984 to June 30, 1984, inclusive, been denied by one or both of the Greater New York Funds for the reason that the liability has been assumed by the corresponding Southern Fund? If the answer is yes:

a. Identify each claim, with date filed, name of employee(s), and date of denial;

b. Provide all claims identified in the answer to (a), and all correspondence, legal pleadings, notes or minutes of meetings, or other relevant documents between the claimant and the Greater New York Funds and their respective counsel or other representatives.

11. Referring to page 2 of Exhibit E to the Third Amended Complaint, which reports the Southern trustees' decision to have a Defined Benefit Pension Plan draft produced, has a Defined Benefit Pension Plan been created? If the answer is yes:

a. Provide the Plan, with all amendments;

b. Provide all documents filed on behalf of the Plan with the Secretary of Labor, the Secretary of the Treasury and the Internal Revenue Service.

12. a. Provide the welfare plan adopted by the Southern Welfare Fund, with all amendments.

b. Provide all documents filed on behalf of the Plan with the Secretary of Labor.

13. Have affected employees been given notice by the Southern Funds of the pension and welfare plans referred to in Interrogatories 11 and 12? If the answer is yes, provide all documents that transmitted such notice, including, but not limited to, Summary Plan Descriptions.

14. Do the plaintiffs claim that one or both of the Greater New York Funds have taken any action to transfer, to one or both of the Southern Funds, liabilities imposed by a trust document, collective bargaining agreement or other governing document? If the answer is yes:

a. Identify and describe the action(s) taken, including identification of all documents relating to such actions;

b. Provide any documents identified in (a).

Interrogatories 15-16 refer to paragraph 38 in the Third Amended Complaint.

15. Is a benefit to which an employee is "entitled" always a "nonforfeitable" benefit as defined in ERISA (without regard to any other attributes that may be indicated by the word "entitled")? If the answer is no, state the conditions that may be imposed on a benefit to which an employee is "entitled" that may not be imposed on a "nonforfeitable" benefit under ERISA.

16. List every "loss" of benefits by employees who are plaintiffs in this case to which they are presently "entitled" under one or both of the Southern plans. For each "loss," provide the following:

a. A description of the specific facts constituting the "loss";

b. All documents that establish the existence and nature of the "loss";

c. Which plaintiffs suffered the "loss"; and

d. The exact amount of the "loss" to each, if the amount was not disclosed in the answer to (a) or (b) of this interrogatory.

17. Is a benefit to which plaintiff employees "may become entitled" always *not* a presently "nonforfeitable" benefit as defined in ERISA?

a. If the answer is yes, state (1) the authority in ERISA or any other law that confers present rights to the forfeitable (unvested) benefits to which plaintiff employees "may become entitled" and (2) the nature of such rights;

b. If the answer is no, state the conditions under which an employee would have a nonforfeitable benefit to which he is not presently "entitled."

18. List every "loss" of benefits by employees who are ~~plaintiffs in~~ this case to which they "may become entitled" under one or both of the Southern Plans. For each "loss," provide the following:

a. A description of the specific facts constituting the "loss";

b. All documents that establish the existence and nature of the "loss"; and

c. The names of the plaintiff(s) who suffered the "loss."

19. List every act or omission of the defendants which adversely affected any plaintiff. For each act or omission, provide the following:

a. A description of the specific facts constituting the act or omission;

b. All documents that establish the existence and nature of the act or omission, including but not limited to trustee resolutions, notes of meetings or amendments to trust documents;

c. The names of the plaintiff(s) who were adversely affected by the act or omission;

d. A description of the specific facts constituting the adverse effect; and

e. All documents that establish the existence and nature of the adverse effect, including but not limited to rejections of claims for benefits to which a plaintiff was entitled from one or more of the Greater New York Funds or Southern Funds.

Dated: January 8, 1987

Epstein Becker Borsody
& Green, P.C.

By: /s/ Henry Rose
Henry Rose
250 Park Avenue
New York, New York 10177-0077
(212) 370-9800

1140 19th Street, N.W.
Washington, D.C. 20036
(202) 861-1874

By: /s/ Harry N. Turk
Harry N. Turk
250 Park Avenue
New York, New York 10177-0077
(212) 370-9800
Attorneys for Defendants

(Affidavit of Service by Mail Omitted in Printing)

Exhibit 2

Response of Plaintiffs to Defendants' First Set of Interrogatories

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing)

RESPONSE OF PLAINTIFFS TO DEFENDANTS' FIRST SET OF INTERROGATORIES

Plaintiffs respond to Defendants' First Set of Interrogatories as follows:

RESPONSE TO INTERROGATORY NO. 1:

The plaintiff management trustees have commenced this action in their fiduciary capacity on behalf of the Southern Funds and the participants and beneficiaries thereof. The action is expressly contemplated by the Employers' and/or Management Companies' collective bargaining agreements with Local 144 pursuant to which the Southern Funds were established. Although the union trustees of the Southern Funds—Peter Ottley, John Kelley, Austin Cedeno, Frank McKinney—have elected not to become plaintiffs to this action, they have stated that they do not oppose the management trustees in proceeding wih the litigation.

a. & b. See documents supplied herewith.

RESPONSE TO INTERROGATORY NO. 2:

No.

RESPONSE TO INTERROGATORY NO. 3:

No.

RESPONSE TO INTERROGATORY NO. 4:

No.

RESPONSE TO INTERROGATORY NO. 5:

Yes. First, the amount of benefits that the Greater New York Pension Fund must pay to those participants who vested before commencing participation in the Southern Pension Fund, has been reduced as a result of the establishment of the Southern Pension Fund. For example, an employee with twenty-five years of credited service—seventeen years under the Greater New York Pension Fund and eight years under the Southern Pension Fund—shall receive the maximum $350 per month benefit as follows: 17/25 from the Greater New York Pension Fund and 8/25 from the Southern Pension Fund.

Second, while it is true that the Greater New York Pension Fund has no obligation to pay unvested benefits, the Southern Pension Fund's "assumption of liabilities" has also reduced the amount of benefits that the Greater New York Pension Fund might ultimately have been required to pay. Specifically, the Greater New York Pension Fund has been relieved of its unvested liability to each of its participants who commenced participation in the Southern Pension Fund without having first satisfied the Greater New York Pension Fund's ten year vesting requirement. Therefore, regardless of how the Greater New York Pension Fund might otherwise have applied its break-in-service rules, it no longer must recognize the prior service credits of these participants. Such prior service credits are recognized instead under the Southern Pension Fund.

a. & b. There are no documents obligating the Greater New York Pension Fund to pay unvested benefits.

RESPONSE TO INTERROGATORY NO. 6:

This interrogatory exceeds the permissible scope under Rules 26(b) and 33(b) of the Federal Rules of Civil Procedure. Without waiving this objection, however, the plaintiffs have answered this interrogatory.

The Greater New York Pension Fund is a jointly trusteed, multi-employer trust fund created and existing pursuant to Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5). As a condition of its continued qualification under Section 302(c)(5), contributions paid to the Greater New York Pension Fund by any employer must be used "for the sole and exclusive benefit of the employees of such employer." Thus, in order to comply with Section 302(c)(5) the Greater New York Pension Fund must recognize that its assets are attributable, in corresponding amounts, to the contributions made by each contributing employer. Further, the Greater New York Pension Fund must utilize those assets solely to benefit the employees of each particular contributing employer. Whenever all of the employees of any particular contributing employer are transferred to another pension trust fund, which assumes the liability for the employees past service credits, the Greater New York Pension Fund must transfer thereto that portion of the assets which are attributable to contributions made by that contributing employer. Otherwise, the Greater New York Pension Fund would be employing those assets for the sole and exclusive benefit of individuals other than the employees on whose behalf the contributions were made. *See Local 50, Bakery & Confectionery Workers Union v. Local 3 Bakery & Confectionery Workers Union*, 733 F.2d 229 (2d Cir. 1984).

Similarly ERISA mandates that the fiduciaries of an employee benefit plan, such as the Greater New York Pension Fund, administer the plan solely in the interest of the participants and beneficiaries and for the exclu-

sive purpose of providing benefits to those participants and beneficiaries. 29 U.S.C. § 1104. Fiduciaries are thus prohibited from preferring one group of participants over another or administering the fund in an arbitrary and capricious manner. Accordingly, a fiduciary breaches his/her duties under ERISA when he/she allows the fund to retain assets attributable to contributions by a particular employer when all the employee/participants of that employer have transferred to another employee benefit plan which has assumed the corresponding liabilities.

In order to ensure compliance with this obligation, Section 1414 was added to ERISA, requiring each employee benefit plan to adopt asset-transfer rules which do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities. Thus, the trustees of the Greater New York Pension Fund have breached their fiduciary duties as they concededly have not adopted such asset transfer rules.

RESPONSE TO INTERROGATORY NO. 7:

This interrogatory exceeds the permissible scope under Rules 26(b) and 33(b) of the Federal Rules of Civil Procedure. Without waiving this objection, however, the plaintiffs have answered this interrogatory.

The Greater New York Welfare Fund is a jointly trusteed, multi-employer trust fund created and existing pursuant to Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5). As a condition of its continued qualification under Section 302(c)(5), contributions paid to the Greater New York Welfare Fund by any employer must be used "for the sole and exclusive benefit of the employees of such employer." Thus, in order to comply with Section 302(c)(5), the Greater New York Welfare Fund must recognize that its assets are attributable, in corresponding amounts, to the contributions made by each contributing employer. Further,

the Greater New York Welfare Fund must utilize those assets solely to benefit the employees of each particular contributing employer. Whenever all of the employees of any particular contributing employer are transferred to another welfare trust fund, which assumes the liability for providing coverage to these employees, the Greater New York Welfare Fund must transfer thereto that portion of the assets which are attributable to contributions made by that contributing employer. Otherwise, the Greater New York Welfare Fund would be employing those assets for the sole and exclusive benefit of individuals other than the employees on whose behalf the contributions were made. *See Local 50, Bakery & Confectionery Workers Union v. Local 3 Bakery & Confectionery Workers Union*, 733 F.2d 229 (2d Cir. 1984).

Similarly ERISA mandates that the fiduciaries of an employee benefit plan, such as the Greater New York Welfare Fund, administer the plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to those participants and beneficiaries. 29 U.S.C. § 1104. Fiduciaries are thus prohibited from preferring one group of participants over another or administering the fund in an arbitrary and capricious manner. Accordingly, a fiduciary breaches his/her duties under ERISA when he/she allows the fund to retain assets attributable to contributions by a particular employer when all the employee/participants of that employer have transferred ot another employee benefit plan which has assumed the corresponding liabilities.

In order to ensure compliance with this obligation, Section 1414 was added to ERISA, requiring each employee benefit plan to adopt asset-transfer rules which do not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities. Thus, the trustees of the Greater New York Welfare Fund have breached their fiduciary duties as they concededly have not adopted such asset transfer rules.

RESPONSE TO INTERROGATORY NO. 8:

This interrogatory exceeds the permissible scope under Rules 26(b) and 33(b) of the Federal Rules of Civil Procedure. Without waiving this objection, however, the plaintiffs have answered this interrogatory.

The authority under which "corresponding liabilities" are assigned to certain contributions to a multiemployer plan and the specific consequences that attach are the same as those identified in response to Interrogatories 6 and 7.

RESPONSE TO INTERROGATORY NO. 9:

a. & b. This interrogatory exceeds the permissible scope under Rules 26(b) and 33(b) of the Federal Rules of Civil Procedure. Withhout waiving this objection, however, the plaintiffs have answered this interrogatory.

The Southern Pension Fund has assumed the Greater New York Pension Fund's unvested liability for the nine years' past service credit of both hypothetical employees. Therefore, Employee B will be entitled to pension benefits from the Southern Pension Fund on the basis of fourteen years of credited service. Employee A has not yet vested under the Southern Pension fund. However, if he/she should subsequently complete one or more years of credited service under the Southern Pension Fund so as to satisfy the Fund's ten year vesting requirement, at retirement he/she will receive benefits from the Southern Pension Fund. These pension benefits would be based upon the aggregate of his/her years of credited service under the Southern Pension Fund and his/her previous nine years of credited service under the Greater New York Pension Fund.

The plaintiffs are unaware as to how the Greater New York Pension Fund will apply its break in service rules to these hypothetical employees. The plaintiffs have been informed by the counsel for the Greater New York Pen-

sion Fund that it will not grant such employees credit for service under the Southern Pension Fund. Moreover, under any circumstances, the Southern Pension Fund has assumed the Greater Pension Fund's unvested liability to all of its participants who on December 1, 1985 became participants in the Southern Pension Fund.

RESPONSE TO INTERROGATORY NO. 10:

None of the plaintiff employees have made a claim to the Greater New York Pension Fund on the basis of service during the indicated periods. Nor have any of the plaintiff employees made a claim to the Greater New York Welfare Fund on the basis of such service which was denied on the ground that the Southern Welfare Fund had assumed the liability. The Southern Welfare Fund did not assume coverage of the plaintiff employees until its establishment on December 1, 1985.

RESPONSE TO INTERROGATORY NO. 11:

Yes.

a. & b. See documents supplied. The Plan Document is being prepared, and a copy will be supplied when it is completed.

RESPONSE TO INTERROGATORY NO. 12:

a. & b. See documents supplied. The Plan Document is being prepared, and a copy will be supplied when it is completed.

RESPONSE TO INTERROGATORY NO. 13:

Yes. See documents supplied herewith. The Summary Plan Description for the Southern New York Pension Fund is being prepared, and a copy will be supplied when it is completed.

RESPONSE TO INTERROGATORY NO. 14:

The plaintiffs do not contend that the Greater New York Funds have taken any action to transfer liabilities. Rather, the plaintiffs state that the Southern Funds have assumed, in accordance with the collective bargaining agreements by which they were established, certain liabilities of the Greater New York Funds.

Specifically, the Southern Pension Fund has assumed the Greater New York Pension Fund's unvested liability for the past service credit of all participants in the Southern Funds. Further, as to those employees who vested under the Greater New York Pension Fund, the Southern Pension Fund will pay them pension benefits on the basis of their additional years of service. Therefore an employee, who retires with thirteen years of service under the Greater New York Pension Fund and two years of service under the Southern Pension Fund, will receive a pension from the Southern Pension Fund equal to two-fifteenths of the benefit for fifteen years of service.

Similarly, the Southern Welfare Fund has assumed the obligation to provide welfare coverage to these same participants.

RESPONSE TO INTERROGATORY NO. 15:

Plaintiffs are unable to discern from the phrasing of this interrogatory the nature of the information that the defendants seek. Therefore, plaintiffs reserve their response hereto until the defendants provide sufficient clarification.

RESPONSE TO INTERROGATORY NO. 16:

a. & c. Each plaintiff employee has lost the benefit of those contributions that were made to the Greater New York Funds on his/her behalf. Although the Southern Pension Fund has assumed the unvested liabilities cre-

ated by such contributions, and the Southern Welfare Fund has relieved the Greater New York Welfare Fund of its obligation to supply welfare coverage to these plaintiff employees, neither Southern Fund has received the corresponding assets. Therefore, these contributions that were made on behalf of the plaintiff employees are being used for the sole and exclusive benefit of others. Moreover, the Southern Funds are without the use of these funds by which they otherwise would have produced the income necessary to satisfy their liabilities at current benefit levels as they vest or become payable. Consequently, to the detriment of the plaintiff employees, the Southern Funds are not as fiscally sound as they otherwise would have been.

b. Plaintiffs do not possess any documents establishing the Greater New York Funds' refusal to transfer these assets. There is no dispute that contributions were made to the Greater New York Funds on behalf of plaintiff employees or that the Greater New York Funds have refused to transfer to the Southern Funds that portion of their assets which is attributable to these contributions.

d. The exact amount of this loss will not be determinable until the Greater New York Funds supply plaintiffs with the requested accounting.

RESPONSE TO INTERROGATORY NO. 17:

Plaintiffs are unable to discern from the phrasing of this interrogatory the nature of the information that defendants seek. Therefore, plaintiffs reserve their response hereto until the defendants provide sufficient clarification.

RESPONSE TO INTERROGATORY NO. 18:

a. & c. Under the applicable collective bargaining agreements, plan documents and controlling provisions of law, the plaintiff employees are entitled to receive a pension if they attain ten years of credited service. They are also entitled to accrue increased pension benefits for service

beyond ten years. Finally, these employees are entitled to receive welfare coverage during all periods of service. By failing to transfer that portion of its reserves which are attributable to contributions made on behalf of the plaintiff employees, the Greater New York Funds have impaired the fiscal stability of the Southern Funds, which has assumed the obligation to provide these benefits to the plaintiff employees. In turn, the Greater New York Funds have frustrated the ability of the plaintiff employees to obtain a pension, achieve additional years of pension credits and/or receive welfare coverage throughout their period of service.

b. Plaintiffs do not possess any documents establishing the Greater New York Funds' refusal to transfer these assets. There is no dispute that contributions were made to the Grea New York Funds on behalf of plaintiff employees or that the Greater New York Funds have refused to transfer to the Southern Funds that portion of their assets which is attributable to these contributions.

RESPONSE TO INTERROGATORY NO. 19:

a., c. & d. The defendants have harmed the plaintiff employees and the other participants of the Southern Funds by allowing the Greater New York Funds to retain those monies contributed on behalf of these employees. As a result, these assets are not being used to provide benefits to the employees on whose behalf they were contributed. Instead they are being used for the sole and exclusive benefit of others.

Defendants have exacerbated the situation by failing to adopt asset-transfer rules as required by 29 U.S.C. § 1414.

Finally the defendants have favored those individuals who continue to participate in the Greater New York Funds to the detriment of those participants who are now participants in the Southern Funds. Contributions

that have been made for the sole and exclusive benefit of these latter participants are now being used to produce benefits for the remaining participants in the Greater New York Funds.

b. & e. Plaintiffs do not possess any documents establishing these acts or omissions of defendants. There is no dispute that defendants have refused to transfer such assets to the Southern Funds, have failed to adopt asset-transfer rules and are not employing these assets for the sole and exclusive benefit of the participants on whose behalf they were contributed.

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Ernest Dicker, being duly sworn, deposes and says that he is a plaintiff in this action, and that he is informed and believes, based on investigations made by the plaintiffs' attorneys, as well as information supplied to him by the other plaintiffs, that the foregoing Responses of Plaintiffs to Defendants' First Set of Interrogatories are true and correct.

/s/ Ernest Dicker
ERNEST DICKER

(Notarization Omitted in Printing)

Exhibit 3

Deposition of plaintiff Desdemona Jones Caruso, conducted on March 18, 1987 (p. 3, 8-10, 21)

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[3]

March 18, 1987

12:15 p.m.

Deposition of DESDEMONA JONES CARUSO, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Catherine Cook, a Shorthand Reporter and Notary Public within and for the State of New York.

* * * *

[8] A. Yes.

Q. You should also understand that your testimony today is somewhat circumscribed and that you may be required to testify again?

A. Yes.

Q. Would you please identify yourself, name, address?

A. Desdemona Jones Caruso, 6 Beckwith Circle, Utica, New York.

Q. And your business is?

A. Owner-operator of several nursing homes.

Q. Would you name them, please?

A. Markview Nursing Home, Massapequa, Long Island; Fieldston Lodge, Riverdale, New York; Greenwich Laurelton, Greenwich, Connecticut; Fiddlers Green, Springville New York; Betsy Ross, Rome, New York.

Q. Ms. Caruso, you are, are you not, a plaintiff in the lawsuit in connection with which this deposition is being taken?

A. Yes.

Q. Ms. Caruso, you are a plaintiff in this action in your role as an employer, contributing to the Southern Funds?

[9] A. Yes.

Q. The pension and welfare funds?

A. Yes.

Q. You are not now a trustee of those funds, are you?

A. No. I am not.

Q. Had you been at any point?

A. Never.

MR. REILLY: Just—I know you did this in Mr. Demisay's deposition.

So each record is clear, by the "Southern Funds," we are referring to the Southern New York Residential Health Care Facilities Association Pension Fund and the Southern New York Residential Health Care Facilities Association Welfare Fund.

MR. ROSE: I agree with that.

Q. There was a time, was there not, Ms. Caruso, when you were a contributing employer to the defendant, Greater New York Fund? And by that, I mean the Local 144 Nursing Home Pension Fund, and the New York Nursing Home—Local 144 Welfare Fund?

A. Yes.

Q. Would you please tell us when you became [10] a contributing employer to the Greater New York Funds?

A. Sometime in 1968. I don't know the exact month.

Q. Did you remain a contributing employer continuously from that time until your withdrawal, together with the other employers that are now contributing to the Southern Funds?

A. Yes.

Q. At some point during that period, were you made aware of the terms of the Greater New York Funds—of their provisions?

A. Not specifically that I can recall right now.

Q. Did you ever receive a copy of the pension trust agreement of the Greater New York Fund?

A. I am sure that I did.

Q. Similarly the trust agreement for the Greater New York welfare fund?

A. Yes.

Q. Did you understand that you were a party to that agreement?

A. Yes.

* * * *

[21] A. I said that I never thought of it relative to its legality or not. I really don't know whether it is legal or not.

Q. Turning again, and calling your attention to paragraph 45 of the complaint, can you explain how other plaintiffs are deprived?

A. Other than myself?

Q. Yes.

A. I have no idea.

Q. Are you aware of any participant not receiving a benefit that that participant was entitled to?

A. No.

Q. Either from the Southern Fund or from the Greater New York Funds?

A. No.

Q. Are you aware of the decision-making process in the Southern Funds, how the trustees make decisions?

A. No.

Q.- Have you read the trust instrument to which you are now obligated or a party to?

A. I might have. I don't recall reading it.

* * * *

Exhibit 4

Deposition of plaintiff Jack Friedman, conducted on March 18, 1987 (p. 3, 8-9, 13, 27-29, 32-35, 38-43, 51-52)

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[3]

March 18, 1987
3:35 p.m.

Deposition of JACK FRIEDMAN, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Catherine Cook, a Shorthand Reporter and Notary Public within and for the State of New York.

* * * *

[8] Q. You should also understand that you are giving this testimony under the equivalent of oath and that the testimony that you give today may be introduced in evidence at a trial or may be used in connection with motions that may be filed in this case.

Is that clear to you?

A. Yes, sir.

Q. You should also understand that your testimony today is somewhat circumscribed, though I would not necessarily agree with Mr. Reilly's statement of that, it certainly is circumscribed and that you, indeed, may be required to testify again.

Do you understand that?

A. Yes, sir.

Q. Mr. Friedman, would you more fully identify yourself, your address, your home and business address?

A. My name is Jack Friedman. My home address is 129 Audley Street, A-U-D-L-E-Y, Queens, New York 11418. I am the administrator of Fort Tryon Nursing Home at 801 west 190th Street, New York City, New York, 10040.

Q. Mr. Friedman, you are a plaintiff in [9] this lawsuit, are you not?

A. Yes, sir.

Q. Indeed, you are a plaintiff in two different capacities?

A. Yes, sir.

Q. As a trustee of the Southern Funds?

A. Yes, sir.

Q. And as the proprietor of Fort Tryon Nursing Home?

A. Yes, sir.

Q. Are you also the proprietor of Franklin?

A. Yes.

Q. And Friedwald?

A. Friedwald House.

Q. You were at one point a contributing employer to the Greater New York Funds, were you not?

A. Yes, sir.

Q. When did you withdraw from those funds?

A. Approximately sometime in 1985.

* * * *

[13] Q. Around that time you withdrew both from the Greater New York Pension and Welfare Funds?

A. Correct.

Q. How long were you a contributing employer to the Greater New York Funds?

A. Approximately 15 years.

Q. During any of that period, were you a trustee of any of their funds?

A. I don't believe so, no.

Q. You don't believe so? You wouldn't remember?

A. I don't want to say anything 100 percent, but I was never at a meeting or anything like that.

Q. Did you have any—do you understand what a fiduciary is of a plan? Is that a term that you have some familiarity with?

A. Fiduciary means a responsibility.

Q. That's part of it, certainly?

MR. REILLY: This is not in the form of an objection, but a point of clarification.

* * * *

[27] Q. To the best of your recollection, Mr. Friedman, has the board of trustees of the Southern Funds ratified, since the commencement of this action, the bringing of this lawsuit on its behalf?

MR. REILLY: When you say "on its behalf," I want to make it clear that this lawsuit, the Southern Funds are not named plaintiffs in this lawsuit.

MR. ROSE: That's correct.

Q. But you presumably, as a trustee, are bringing it on behalf of the fund, is that correct?

A. Correct.

Q. My question is: Has the board of trustees, to this very day, ratified the bringing of this lawsuit on its behalf?

A. I don't recall them ratifying it, the action.

Q. Has it even been discussed at a board of trustees meeting?

A. Is this the same question we discussed earlier?

Q. I don't think so?

[28] A. Then I am very confused now.

MR. REILLY: Your question was—you said has it ever been discussed?

Q. Has the bringing of this lawsuit on its behalf ever been discussed, on behalf of the Southern Funds, ever been discussed since the commencement of the lawsuit by the board of trustees of the Southern Funds?

A. I don't understand the question because it seems to me I answered the question earlier, which I don't mind answering twice, but I don't want to trip myself up.

Q. I don't want you to. I just want information.

A. May I paraphrase the question and if I am wrong please tell me.

Are you asking me has the action that we are referring to here been approved by the board of trustees or was it discussed by the board of trustees.

Q. Either, yes.

A. It has not been approved, to the best of my knowledge. And there was discussion on it.

However, are we talking about the [29] original which you said may have been filed before—

Q. I am talking about since the commencement of this action.

A. Yes. And assuming the commencement of the action was in January '85 for discussion of '85.

Q. I think it was June?

A. O.K. Has this been discussed at a board meeting? I believe so.

Q. Can you, to the best of your recollection, tell me when?

A. No. Not recently, not in the past six months, I don't believe.

Q. Taking off your trustee hat and going back to your Southern employer hat now, there was a point, at or about the withdrawal from the Greater New York Funds, that you and your colleague Southern employers discussed, did you not, what you would do about a pension plan and a welfare plan?

A. Yes.

* * * *

[32] A. Was I aware of the fact sometime before the contract was signed that there were different kinds of pension plans that we could have gone into or no pension plan, and we had the opportunity of going into different kinds of welfare plans, dental plans or not going into any of them whatsoever?

Q. Yes.

MR. REILLY: I don't think Mr. Rose's question was—

MR. ROSE: I will buy that variation of the question.

MR. REILLY: I object to it as stated that it assumes as fact they had all these options.

Your original question was, did they have such options.

MR. ROSE: I am asking if he was aware they did.

A. Do they have the option of having a welfare fund to pay for all kinds of surgery or [33] partial surgery, is that what you are saying?

Q. That's certainly part of it.

A. Yes.

Q. You were aware that you had a number of options on both pension and welfare sides?

A. On a technical basis, yes. Only in—practical basis, maybe no.

Q. Practical basis meaning, again, the union?

A. Right.

Q. We put that aside?

A. Or the union or our desire to do something for the employees. On a technical basis, yes. On a practical basis it would go in one ear and out the other.

Q. I appreciate your answer, thank you.

So when you did discuss the pension and welfare plan issues with the representatives of the union, you agreed to—what you did agree to, and what the record shows you agreed to as a matter of bargaining with the union, is that correct, what you agreed to in the collective bargaining agreement is what I am referring to now?

MR. REILLY: Can we identify for the [34] record, there is a provision or something in the collective bargaining agreement, are you talking about the section on Southern Funds? The collective bargaining is a lengthy document with many, many provisions.

MR. ROSE: I am referring to provisions relating to the pension fund and welfare plan provisions in that collective bargaining agreement.

THE WITNESS: The question again is—would you just repeat the question, please.

MR. ROSE: Would you read it back, please.

(Record read)

MR. ROSE: I think having heard that, I am going to restate it.

THE WITNESS: Please.

Q. I think what I am asking is rather obvious, and that is that the collective bargaining agreement that you entered into is the result of your bargaining with the union with regard to what it provides as to a pension plan and a welfare plan?

A. Correct.

Q. If the bargaining powers were different [35] or at a different time, it might have come out a little bit different?

A. Anything is possible.

Q. In the course of the discussions with regard to the pension plan, one of the issues was, was it not, whether or not to give past service credit to the employees of the Southern employers in any pension plan that was to be established for them?

A. May I ask you to repeat the question and try to give me some examples or numbers that we are talking about? In other words, may I paraphrase the question?

Are you saying did we discuss the issue of an employee who was with the Greater New York Funds for eight years and then coming over to us for two years?

Q. Yes.

A. What our obligation would be, if any?

Q. My question is whether you discussed whether or not to give credit, in your example for those eight years?

A. I don't recall the actual discussion, but I know we are, in effect, I believe, doing it.

* * * *

[38] Q. I am not sure you have a choice.

A. I don't know. My answer is I don't know. Having been given the full opportunity to read this, I cannot comprehend it.

Q. Do you remember being at this meeting?

A. Offhand no. If it says I was there, I assume I was there.

Q. I call your attention to page 1 of the minutes of the November 5, 1985 trustees meeting of the Southern

Funds, and ask you whether your name appears as among those present?

A. Yes, present.

Q. Do you have any reason to believe that this is inaccurate?

A. No.

Q. You have recollection of discussing the giving of past service credit to the employees at any meeting, apart from this one?

A. I have a recollection, but I have no [39] close details of it.

Q. Insofar as you have a recollection of such discussion of such a trustees' meeting, do you recall that you had a choice, that this was one—this was not the only choice you had?

A. I don't recall.

Q. Wasn't this element one of the most expensive—strike "most expensive"—a very expensive feature in the plan?

MR. REILLY: Objection. That question doesn't go to the issue of standing and the characterization of "very expensive" is ambiguous.

MR. ROSE: Expensive in comparison to other elements of the plan.

MR. REILLY: Whether it was more or less expensive than certain elements of the plan does not go to the question whether this plaintiff has standing to bring this lawsuit.

The comparison of costs of the various items is not relevant to that issue.

Q. Whatever choice was made by the board of trustees, Mr. Friedman, it was their choice, was it not?

[40] A. I would have to assume so.

Q. Let me call your attention to paragraph 45 of the third amended complaint, where it alleges plaintiffs have been deprived of a transfer of the portion of the Greater Funds corpuses. And there is more.

Plaintiffs includes you. It includes you in two different capacities, so you are alleging that you have been

deprived of a transfer of a portion of the Greater New York corpuses.

Would you explain to me how you have been deprived in each of the two capacities that you are a plaintiff here?

A. As an employer, the way I see the question—I just want to rephrase the question, and you will tell me if I am right or wrong in my question.

I said I am being deprived because we don't have the transfer of certain assets.

Q. Who is "we"?

A. You said I am wearing two hats, correct?

Q. But you said "we."

A. I am wearing two hats as employer and trustee.

[41] Q. The "we" is both you.

Go ahead.

A. I am saying that I am being harmed, if we don't get the money from the funds—

Q. May I interrupt you. The language. Perhaps you could take a look at it, the language I am focusing on are the fourth and fifth lines, "plaintiffs have been deprived of a transfer."

Now if I understand the claims here, you as an employer are not making any claim that you are entitled to a transfer personally of the money, is that correct?

A. Excuse me—

MR. REILLY: When you say "transfer," what are you talking about?

MR. ROSE: Transfer of the portion of the Greater funds corpuses.

A. As an employer it hurts me or what have you. The reason for that—

Q. What hurts you?

A. The lack of the funds of the—the lack of the Southern New York Funds receiving certain monies from the Greater New York Funds.

Q. That's not what I am focusing on.

[42] It says you, plaintiffs, that includes you, have been deprived of a transfer. You as an employer.

How have you been deprived of a transfer to you?

MR. REILLY: Objection. It doesn't say a transfer to the employer.

The witness began his answer, I think he should be allowed to continue.

It says deprived of a transfer. It doesn't say a transfer to where. Let's not misstate.

MR. ROSE: "Plaintiffs have been deprived of a transfer of the portion of the Greater Funds corpuses" and attributable to"—that doesn't add anything.

Q. Explain how you are deprived, in your own words, of that transfer?

A. If we don't have the transfer, we will not be able to pay our employees certain benefits.

Q. If you don't have a transfer from who to who?

A. As I said earlier, if we don't have a transfer from the Greater New York Funds to the [43] Southern New York Funds, our employees will not be able to be covered in the future for many benefits. Our welfare costs are more than the income or rather, more than is being charged to the employers, and it will be impossible to keep our level of benefits or rather, our level of benefits will have to be reduced because we don't have the funds to pay for it.

Therefore, if we had the transfer of funds from Greater to Southern, we would probably be able to afford these present benefits because of interest income, or what have you.

Q. Now, am I correct that that was your response to how you as an employer are deprived, is that your answer?

A. Correct.

Q. Now how are you deprived as a trustee?

A. As a trustee also, you want to see that the employees receive decent benefits. If there is insufficient income to pay for the benefits—

Q. As a trustee, Mr. Friedman, how could you prudently set up a benefit level which you can't afford?

* * * *

[51] A. I don't recall.

Q. Was it one of your employees?

A. I don't recall.

Q. Was it for benefits to be provided by your plans or the Greater New York plans?

A. I don't recall.

Q. Mr. Friedman, when the board of trustees had the issue of benefit levels under the Southern pension plan before it, did it have an actuarial report?

A. You are referring to the pension plan?

Q. I am.

A. I believe so.

Q. Did the actuary offer you more than one choice?

A. One choice referring to one carrier or one—

Q. Level of benefits, arrangement, different level plan, different kinds of plan?

A. I know there is an awful lot of discussion with the type of—not the type of company, not the company—at one time there was a question of defined benefit or defined contribution. That goes back a while ago.

[52] Q. So there were some choices, at least the last one you mentioned, is that correct?

A. Correct.

Q. Might there have been other choices?

A. There was a lot of talk that I could tell you. I don't recall the talk.

Q. Do you remember the actuarial report?

A. No.

Q. Or study.

Do you remember receiving any report?

A. We received a lot of reports.

Q. More than one page?

A. I believe so, yes.

Q. As a trustee of the Southern Funds, are you familiar with, in a general way, how the records are kept?

MR. REILLY: Objection. How the records of the Southern Funds are kept is not relevant to this witness' standing in the lawsuit.

MR. ROSE: Unless your counsel directs you not to answer—

MR. REILLY: Witness is directed not to answer the question.

* * * *

Exhibit 5

Deposition of plaintiff Abraham C. Grossman, conducted on March 18, 1987 (p. 3, 9-10, 12-14, 17-18, 27-28)

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[3]

March 18, 1987

2:00 p.m.

Deposition of ABRAHAM C. GROSSMAN, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Catherine Cook, a Shorthand Reporter and Notary Public within and for the State of New York.

* * * *

[9] Q. Would you identify yourself, name, address, business and its address?

A. Abraham C. Grossman. Home address is 1569 49th Street, Brooklyn, New York. Business address is Bruckner Nursing Home, 1010 Underhill Avenue, Bronx, New York.

Q. Mr. Grossman, you are, are you not, a contributing employer to the—what we are going to be calling the Southern Funds? And by that, we mean the the Local 144 Southern New York Residential Health Care Facilities Association Pension Fund and the Local 144 Southern New York Residential Health Care Facilities Association Welfare Fund?

A. That's correct.

Q. Besides being a contributing employer to the other funds, you are a trustee, are you not?

A. Yes, I am.

Q. Have you been a trustee of the Southern Funds since creation of those funds?

A. Yes, I have been.

Q. And when was that?

A. Actually the beginning of operation was December of 1985.

Q. Prior thereto, you were a contributing [10] employer to the Greater New York Funds?

A. Yes.

Q. Pension and welfare funds?

A. Yes.

Q. And would you tell us, please, for what period of time were you a contributing employer to the Greater New York Funds?

A. For various facilities statrting in 1986, August of 1986.

Q. And continuously through—your withdrawal?

A. Continuously with one or more facilities until we stopped contributing to the Greater New York plan and contributed to the Southern New York.

Q. Were you ever a trustee of the Greater New York Funds?

A. Never.

Q. Neither of them?

A. Never.

Q. Do you have any information as to any contributing employers to the Greater New York Funds who have withdrawn from those funds other than the Southern employers?

A. I am not aware of any.

* * * *

[12] Q. Have you read them?

A. At one point, yes.

Q. In fact, didn't you participate in adopting them?

A. Yes, I did.

Q. You did sign them?

A. I did sign them.

Q. Are you familiar with the procedure specified in those trust agreements as to how decisions of the boards of trustees are to be made?

A. In general terms, yes.

Q. Would you tell us your understanding?

A. My understanding is that there is to be a vote; that each side, management side and union side, constitute one vote. If there is an impasse, it goes to arbitration.

Q. The Southern Funds are not party plaintiffs in this lawsuit, are they?

A. No, they are not.

Q. Was the question as to whether they should be ever discussed by the trustees?

A. Yes, it was. And a—

Q. Did they ever vote—informally, did they decide?

[13] A. I believe it did not come to a vote, but it was stated by the union trustees that they would not become plaintiffs because they are the defendants, because they are the trustees in the Greater Fund. Therefore, they would not participate, but they had no objection to the employee trustees bringing the lawsuit.

Q. Employers, you mean?

A. Employers—on behalf of the employees.

Q. On behalf of the employees?

A. On behalf of the employees, money which is there for their benefit.

Q. Do you mean on behalf of the employees or on behalf of the plan?

A. On behalf of the plan which benefits the employees.

Q. It is true, is it not, Mr. Grossman, that the board of trustees of the Southern Funds has not authorized the plan to be a party plaintiff in this lawsuit?

A. That's correct.

Q. Since what you described is essentially a disagreement among the trustees, why was not the arbitration procedure used?

[14] MR. REILLY: I object to your characterization of what he said as a disagreement between the trustees.

MR. ROSE: If he can answer, that's fine. If he needs it rephrased—

MR. REILLY: The question is improper in the sense that it characterizes the witness' testimony.

Q. Let me ask you, did I characterize it erroneously?

A. I don't think it ever came to an official vote where there was a deadlock on the vote.

There was discussion about it and it was—since the union trustees said they were in an impossible situation to being both the defendants and the plaintiffs, and that the management trustees on their own should bring the lawsuit as trustees of these Southern Funds.

Q. You're not suggesting, are you, that the union trustees wanted you to bring the lawsuit at all, are you?

A. They said they would not have any objection if we did.

* * * *

[17] Q. So there has been some discussion?

A. There has been some discussion probably throughout the entire period at one time or another.

Q. In the the course of discussions regarding the pension plan, the Southern pension plan, was one of the questions to be resolved as to whether or not credit would be given for service of participants while they were participants in the Greater New York Fund?

MR. REILLY: What time are we talking about, Mr. Rose?

MR. ROSE: When they had these discussions, my question is whether they discussed this issue.

A. That the credits of the previous employment, while they were covered under the Greater that they were included, yes, there were discussions.

Q. What was the nature of the discussions?

A. During the negotiation period, there was a discussion of the union concerns if we establish new funds that it would not be starting as day one, if somebody was an employee for any length or period [18] of time, that that would be counted at least towards their retirement benefits.

Q. You mean they asked for it and you agreed with it without any further discussion, is that what you are suggesting?

A. There was discussion.

Q. What were the—were there any alternatives suggested or discussed?

A. There may have been. I don't recall any specific alternatives.

Q. You were aware then that you had a choice as to whether or not to give past service credit or not to those participants, is that correct?

A. Yes.

Q. You ultimately decided, you and your colleagues, your attorney, employers and ultimately the trustees, your fellow trustees agreed to give that credit? And the minutes of your meetings show that, is that correct?

A. Correct.

Q. Have you had an opportunity to look at the plaintiffs' response to defendants' first set of interrogatories?

A. No.

* * * *

[27] My question to you: How have you been deprived?

MR. REILLY: Before the witness answers the question, you are using the word "you," and I think the word "you" needs to be clarified for the witness because it is unfair to me because this witness is wearing, for a lack of better term of art, wearing more than one hat.

Q. I would like for you to answer for both.

A. As a trustee, that I just gave is a valid one.

As trustee of the Southern Funds, I have an obligation to see that the funds have enough funds available in order to provide the benefits that we are obligated to provide to the employees.

As far as an employer, as a contributor to the funds, if funds are not—let me go back. As a contributing employer, if the funds do not have a financial base in order to be able to provide the benefits that are called for under the contract, the end result would be that, as an employer, I would be asked to contribute more. So, therefore, I have injury.

[28] It is pretty much the same as the trustee; if there is not enough funds available, the base isn't big enough,

it is not as solid and sound financially. It becomes a responsibility or a difficulty to provide those benefits that are called for.

By not transferring the funds that have already been contributed for the employees from the old fund to the now fund, injures me in both positions.

Q. When the Southern pension fund was created and you set the benefit level, was that benefit level set on the condition that money be transferred from the Greater New York Fund, New York pension fund?

A. I don't know whether the word "condition" is correct. That may be too strong a word.

* * * *

Exhibit 6

Deposition of plaintiff Nicholas D. Demisay, conducted on March 18, 1987 (p. 3, 8-10, 14, 16-21, 25-27, 31-34, 45-46)

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[3]

March 18, 1987

11:00 a.m.

Deposition of NICHOLAS D. DEMISAY, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Catherine Cook, a Shorthand Reporter and Notary Public, within and for the State of New York.

* * * *

[8] Q. Mr. Reilly has put in the record at the outset what he sees as the scope of the deposition.

You understand that your testimony may be somewhat limited thereby, that is not by virtue of his statement but by virtue of the court, and you may be required to testify again if the court permits further discovery?

A. Yes, sir, I understand that.

Q. For the record, would you please identify yourself fully, your name?

A. Nicholas Demisay.

Q. And your address?

A. 300 East 54th Street, New York City, Apartment 32-D, 10022.

Q. And your business is?

A. I am the administrator and operator of Clove Lakes Nursing Home, 25 Fanning Street, Staten Island New York 10314. I am also a trustee of the Southern New York funds for the management.

Q. And Mr. Demisay, you are a plaintiff in the action which is the subject of this deposition?

A. Yes, that is correct.

[9] Q. You are a plaintiff in two respects, is that correct?

A. Yes, sir.

Q. One as trustee and one as—and also individually as the proprietor of Clove Lakes Nursing Home?

A. Yes, sir, that's correct.

Q. You are aware, Mr. Demisay, that you as a plaintiff have made certain allegations in the third amended complaint filed in this lawsuit?

A. Yes, sir.

Q. You have acknowledged that you are a trustee of the Southern Funds?

A. Yes, sir.

Q. Were you a contributing employer to the Greater New York Pension and Welfare Funds at one time?

A. Yes, sir.

Q. Would you tell us the period of time that you were such a contributing employer?

A. My former partner and I opened up Clove Lakes Nursing Home in September of 1967. I am not sure whether it was when we opened, but I can safely say we started making contributions as of January 1, [10] 1968.

Q. You continued—

A. Excuse me.

At that time, it was known as Metropolitan New York Nursing Home Association; with 144 it became the Greater New York. We have been making contributions to the 144 Pension Fund since 1968.

Q. Was Metropolitan a precedecessor to Clove Lakes?

A. No, Metropolitan was the former name of what is now known as the Greater New York. It was the Metropolitan Nursing Home Association at the time. Same group, just changed their name at a later date.

Q. I see.

You were a contributing employer to the Greater New York Funds, both the pension and welfare funds, continuously.

MR. REILLY: Just so the record is clear, I think we have identified the Greater New York Funds in the papers as a defined term.

* * * *

[14] Q. Let me see if I am understanding you.

The whole liability for a given participant benefit is payable by the Southern Funds subject to an offset of any benefits that are received from the Greater New York Funds, is that correct?

A. That's correct.

Q. You said that there is—I think you referred to it as an understanding—it is more than an understanding, isn't it. Isn't it a matter of contract?

Don't you have a collective bargaining contract that obligates you to pay those benefits as you described them?

A. Yes, sir.

Q. Indeed, you have a pension trust instrument to which you are a part, which obligates you to make those same payments?

A. Yes, sir.

Q. What is the decision-making process for the Southern Funds?

* * * *

[16] A. The management, four representatives of management and four representatives of Local 144.

Q. Who makes final decisions?

A. The group makes the final decisions.

Q. The group being the management?

A. The trustees from management and the trustees from labor.

Q. In other words, the board of trustees makes the decisions?

A. Yes, sir.

Q. Has the board of trustees of the Southern Funds discussed the question as to whether it should be a plaintiff in this case?

A. Yes.

Q. Is it so that the board of trustees has declined to vote to do so?

A. It is my understanding that when the discussion came up, we had an agreement that Local 144, as represented by the labor, our trustees from labor, would not oppose litigation brought, but they would not become part of the litigation itself or take any part, one way or the other.

MR. ROSE. I ask that the question be reread.
[17] And I ask you to respond to the question.

A. I thought I did.

MR. REILLY: I think the witness responded in the way he felt appropriate.

MR. ROSE: I don't think the answer is responsive.

MR. REILLY: That's a matter of interpretation.

MR. ROSE: I don't think it is.

(Record read)

A. Never came to a vote. We had an understanding prior to establishing the funds with Local 144 that they would not oppose any litigation brought about by management. But it never really came to a vote, to my recollection.

Q. Was it proposed?

A. No, sir.

Q. Then why was it discussed?

A. It was discussed because there was concern regarding the fiscal viability of the current welfare funds.

Q. You say it was never proposed by any member of the board of trustees that—or suggested [18] at a meeting of the board of trustees that the Southern Funds be a plaintiff in this case?

A. No. My recollection is that when these discussions came up regarding the fiscal viability of the welfare fund,

which is extremely expensive, there was some discussion concerning the so-called carve-out litigation.

It never came to a vote. There was no vote on it because there was an understanding that the Local 144 management—

Q. My question was: Was it ever proposed or suggested?

A. The best of my recollection, at one of the trustee meetings when this discussion came up, I don't know which one of the trustees from labor suggested that we pursue our litigation promptly in order to get some of this money transferred over to the Southern New York Funds. I don't remember who it was.

But it never came to a vote. It was never an issue. It was an understanding that we had right from the onset that they would not oppose a carve-out litigation.

Q. Mr. Demisay, is it so that the board of [19] trustees have never voted to be a plaintiff in this action?

A. That's correct.

Q. However, you are bringing this action as a trustee of the Southern Funds?

A. As the management trustee.

Q. As a trustee of the Southern Funds?

A. Representing management; yes, sir.

Q. Doesn't your trust agreement for the Southern Funds provide that decisions on behalf of the funds be made by the board of trustees?

A. Yes, sir.

Q. And in the event of a dispute, is there not an established procedure for resolving that dispute?

A. Yes, sir.

Q. So is it fair to say that you are not authorized to bring an action on behalf of the Southern Funds?

A. No, sir.

Q. Where did you receive the authorization?

A. In our discussions in negotiations with Local 144, when we were setting up separate pension and welfare funds, there was a clear understanding—[20] and I am not sure it is not in writing, I think it is in writing some-

place—that they would not oppose our pursuing litigation on getting our corpus out of the Greater New York Funds.

Q. Yes, that is correct.

You equate the not opposing with authorization to bring the lawsuit?

A. Yes, sir.

Q. Have you been so advised that that is the same?

O. I was advised by our counsel, yes.

MR. REILLY: Objection.

What do you mean by "so advised"?

MR. ROSE: Has he been so advised.

MR. REILLY: If you are referring to consultation with counsel, then I object.

MR. ROSE: All objections are reserved.

Are you directing him not to answer?

MR. REILLY: To the extent that the question calls for the witness to go into consultations between himself and his counsel, I direct the witness not to answer the question.

Q. We have established, have we not, that [21] the board of trustees did not authorize the bringing of this lawsuit, they did not vote to authorize the bringing of this lawsuit?

A. They did not vote, that's correct. There was no vote.

Q. Has the board of trustees of the Southern Funds, at any time since its commencement, ratified the bringing of this lawsuit?

A. You mean the trustees of management—

Q. Have they taken action at a meeting which is recorded in minutes?

A. No, sir. Not to my knowledge.

Q. You and the other Southern employers who are contributing employers to the Southern Funds agreed to establish the Southern Funds, did you not?

A. Yes, sir.

Q. You knew that you were not legally obligated to do so, is that correct?

MR. REILLY: Objection. If you are asking the witness to draw a legal conclusion, that's going beyond the scope of this witness. You can ask the witness factual questions.

* * * *

[25] MR. REILLY: By "particular terms." you are referring to the terms of the trust agreements?

MR. ROSE: Yes, I am.

A. Did we discuss them? Yes.

Q. And the same terms were discussed, were they not, at a board of trustees meeting of the Southern Funds?

A. No, sir.

Q. All eight of the trustees signed those instruments, did they not?

A. Yes, sir.

Q. They didn't discuss hem (sic)?

A. They discussed them before it actually became an accomplished fact that we were now a pension and welfare fund known as Southern New York.

There was a great deal of negotiation and discussion prior to that time. When we agreed to it, we signed it and there was no further discussion after we signed it.

Q. In your discussions among yourselves, among the Southern employers and with your negotiations on the subject with the union, did you not discuss the issue of giving past service credit [26] to the participants for their service under the Greater New York Funds?

MR. REILLY: With whom—I am lost. It was a very long question. With whom are these discussions being had?

MR. ROSE: Read the question back.

(Record read)

MR. REILLY: Just so I understand, we are talking about discussions with Southern employers and, number two, discussions in the form of negotiations with Local 144? It is a two-part question.

MR. ROSE: That's right.

A. The answer to both parts is yes, there were discussions.

Q. So that was a question which could have been resolved in more than one way.

If it was negotiated, it could have been different than it came out?

A. What could have been different?

You asked if we had negotiations and discussions. Yes.

Q. My question was, the result of giving past service credit as you have, could have been [27] different had the negotiations or your willingness to give on that issue been different?

A. Sure.

Q. It is possible, for example, that you might have not given past service credit at all, or you might have given partial past service credit, is that correct?

A. If Local 144 had agreed to it, sure.

Q. Mr. Demisay, is it fair to say that there is a similarity between the terms of the Southern Funds, the trust instrument and the trust instrument of the Greater New York?

A. Is it fair to say that there is a similarity?

Q. Yes.

A. Yes.

Q. In fact, aren't they very, very similar, almost identical?

A. They are not identical. They are similar.

Q. Can you mention the differences that come to mind?

A. Offhand no; I would have to review the whole thing.

* * * *

[31] Q. Are you deprived?

A. As an individual?

Q. As an individual management trustee, are you deprived, as alleged in that paragraph?

A. It is my understanding that my fiduciary obligation as a trustee is to make certain that those pension and welfare funds are fiscally viable and remain so and if,

for any reason, they are not, I could be held personally liable.

Q. And in your capacity as a distributing employer, are you deprived?

A. Yes.

Q. How?

A. Well, if those funds are not fiscally viable—

Q. I am not sure what that means.

Would you explain?

A. The welfare funds at the present time are running cash flow short. There is not enough money in it. If something isn't done fairly soon, the only way it is going to remain viable is that we'll have to increase our contributions to the [32] welfare part. That affects me as an employer.

Q. Yes, it certainly does.

Are you aware that as a trustee you are to—you are obligated to make your decisions solely in the interest of participants?

A. Yes, sir.

Q. And not employers?

A. Yes, sir.

Q. However, this decision seems to be primarily in the interest of employers, does it not?

A. No, sir. You asked me a question of how does it affect me as an employer and how it affects me as a trustee.

Q. The effect was that you might have to made additional contributions?

A. That's one of them.

The other thing, as a trustee, we can reduce the benefits to the employees; that would have to be negotiated with 144.

Q. How are the participants deprived?

A. The employees?

The plaintiffs, the plaintiff employees in this action?

A. They can be certainly deprived if we [33] have to reduce the benefits in negotiations.

Q. Mr. Demisay, let me remind you, the allegation is that plaintiffs have been deprived.

Would you kindly explain to me how they have been deprived?

A. They have been deprived of some assurance that monies that have been contributed on their behalf to the Greater New York Fund are no longer in the control of the Southern New York. They are not there. That money is over there in the Greater New York Fund.

We have no control over that. We have nothing. Yet, we the employers have been contributing to those funds, Clove Lakes in particular, since 1968.

Now, the use of those funds or the funds in the Southern New York properly invested accrues to the employees. Those funds do not belong to the employer. They belong to the employees. We, as trustees, simply have the management of those funds. They don't belong to the trustees. They don't belong to the employers.

Q. Mr. Demisay, I am going to try the question once more.

[34] The allegation is that plaintiffs have been deprived.

A. Yes, sir.

Q. I want you to explain to me how they have been already deprived as of this date?

A. I just explained that to you, to the best of my ability, sir.

Q. You were talking about the future, as I understand.

A. No, we are talking about the present viability of those funds.

Q. Have the benefits not been paid to any participant?

A. No, sir, they have all been paid.

Q. They have all been paid?

A. Yes, sir.

Q. That's both on the pension side and on the welfare side?

A. Yes, sir.

* * * *

[45] MR. REILLY: Objection. This again goes beyond the scope of standing what the provisions of the Southern New York plan are.

MR. ROSE: Are you directing him not to answer?

MR. REILLY: Unless I am given an explanation as to how this goes to standing, I will direct the witness not to answer.

MR. ROSE: Are you directing him not to answer?

MR. REILLY: I take that as a "no" to my question. I direct the witness not to answer in that the question goes beyond the question of standing.

MR. REILLY: Off the record.

(Recess taken)

Q. Mr. Demisay, do you claim any portion of the assets of the Greater New York Funds for yourself personally as an employer or as a trustee of the Southern Funds?

A. Personally?

Q. Yes.

A. Personally, no, but as a representative [46] of the management trustee, yes. We do claim a portion of the funds that were contributed to Greater New York belonging to Southern New York.

Q. Your claim is a representative claim; you have no personal claim?

A. Yes, sir, that's correct.

Q. In either capacity?

A. That is correct, sir.

* * * *

Exhibit 7

Deposition of plaintiff Martha Mulligan, conducted on March 18, 1987 (p. 3, 8-11, 14, 27, 29)

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[3]

March 18, 1987

5:15 p.m.

Deposition of MARTHA MULLIGAN, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Catherine Cook, a Shorthand Reporter and Notary Public within and for the State of New York.

* * * *

[8] Q. You understand that you have been sworn and therefore, your testimony is given under oath?

A. Yes, sir.

Q. And your testimony you give today may be introduced in evidence at a trial or in connection with motions that might be filed in this case.

Do you understand that?

A. Yes, sir.

Q. Further, since there is some—there are some restrictions, though I don't necessarily agree with the statement of them by Mr. Reilly, there are some restrictions on the scope of this deposition. There is a possibility that you may have to testify again.

Having said that, would you please identify yourself more fully; give your name, address and your position and where you work and where that is?

A. Yes, sir. My name is Martha Mulligan, I live at 342 Seaver Avenue, Staten Island New York, 10305. I

work at Clove Lakes Nursing Home, 25 [9] Fanning Street, and I have worked there for the last 12 years. I am a nurse's aide. I work the 11 to 7 tour, first floor, nursing home.

Q. You are the Martha Mulligan in the caption of the third amended complaint filed in this action are you not?

A. Yes, sir, that's correct.

Q. Have you seen this third amended complaint before?

A. Yes, sir, I have.

Q. You just indicated that you worked at Clove Lakes Nursing Home for 12 years?

A. Yes, sir.

Q. Did you work at any other nursing home prior thereto?

A. Yes, sir, I worked at Seaview on Staten Island also.

Q. Is Seaview Nursing Home a contributing employer to the Greater New York Pension and Welfare Funds, do you know?

A. I really don't know. I am not sure.

Q. How long did you work at Seaview?

A. For three years.

Q. Have you had occasion to inquire, or in [10] the absence of any inquiry by you, has anybody advised you that you have a vested benefit?

A. Yes, sir.

Q. Who advised you of that?

A. Mr. Reilly.

Q. Have you ever received anything in writing that would indicate that—anything from the fund or any funds?

A. I am really not sure, Mr. Rose. I may have had some papers, like when I first joined the corporation. But I don't remember.

Q. You were aware that you are a participant in the Greater New York Pension Fund and their welfare fund

until Clove Lakes withdrew from those funds and it, together with others, created the Southern Funds?

A. Yes, sir, I understand that.

Q. Have you had occasion to claim any benefits from the Greater New York Funds, either the pension fund or the welfare fund and ever have that claim be denied? I am particularly interested in the period since Clove Lakes withdrew from the Greater New York Funds?

A. I have not drawn anything since, but I [11] did draw when I was in the hospital. I had a hysterectomy done; that was when I first joined Clove Lakes, that was 1977. I had a hysterectomy done then. You go through the HIP kind of thing and there was no problem.

Q. Is it fair to say that you have not had any experience with denial of any claims that you have made for benefits to the Greater New York Funds?

A. No, sir, I have never been denied a benefit.

Q. Are you aware of any other participants who were entitled to benefits from the Greater New York Funds, either the pension fund or the welfare fund, and it was denied?

A. Do you mean do I know anybody who had trouble with them?

Q. Yes.

A. No, sir, I don't.

Q. You were aware that while you were a participant in the Greater New York pension and welfare funds that you were entitled to that certain level of benefits either pension benefits or welfare benefits, were you not?

A. I am aware of that, yes.

* * * *

[14] Q. Has anybody told you that you won't receive the benefits to which you are entitled under the Southern Funds?

A. No, sir.

Q. Do you have any reason to believe that you will not receive the benefits promised to you to which you are entitled?

A. I have no reason to believe that I will not.

Q. As far as you know, are the benefits that you are entitled to not less than they were before your employer withdrew from the Greater New York?

MR. REILLY: I believe the witness was asked that question and answered it.

MR. ROSE: She said she didn't know the level.

MR. REILLY: You asked her whether or not she had comparable benefits under both and she indicated she didn't know whether or not they were comparable.

MR. ROSE: That's correct. I did ask that.

* * * *

[27] MR. REILLY: Would you finish reading.

Q. I want to focus on "have been deprived." You can read the rest. You have it in front of you.

The point I am making is you have been deprived already. I just want your explanation as to how.

MR. REILLY: I would like the record to reflect what Mr. Rose is reading. He says "have been deprived"; the sentence goes on to say "of a transfer of a portion of the Greater funds corpuses attributable to the contributions made by the employers and management companies and as to which the Southern Funds have assumed the corresponding liabilities."

MR. ROSE: We have read that into the record previously. The witness has the language in front of her. I don't think it is necessary for counsel to read it into the record again.

Q. Would you answer my question?

A. No, I have not been deprived.

Q. How?

A. I have not been.

* * * *

[29] MR. ROSE: I am using the term as it is in the law.

MR. REILLY: Then you're asking the witness to draw a legal conclusion as to whether or not she is a participant.

If you want to ask her about the factual underpinnings—

Q. Ms. Mulligan, do you claim to have any rights under the Greater New York welfare fund?

A. Do I claim to have any rights under the Greater New York Fund—

Q. Benefits?

A. Yes, I do.

Q. What rights?

A. What rights do I have?

Q. This is Greater New York.

A. O.K., the Greater New York.

Q. And right now, not before?

A. I claim I have the right to be guaranteed a certain amount of retirement—

* * * *

Exhibit 8

Deposition of plaintiff Edward Wizner, conducted on March 31, 1987 (p. 3, 8-9, 11-14)

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[3]

March 31, 1987

11:10 a.m.

Deposition of EDWARD WIZNER, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

* * * *

[8] Q. Mr. Wizner, you are an employee of who?

A. Of Clearview Nursing Home.

Q. Incidentally, would you identify yourself by giving your full name, address, where you work.

A. My name is Wizner, Edward. I'm an employee of Clearview Nursing Home in Whitestone.

Q. How long have you worked for Clearview Nursing Home?

A. 23 years.

Q. Are you aware that your employer withdrew from the Greater New York Pension and Welfare Funds?

A. Yes. It happened, Yes.

Q. And you knew that before your employer withdrew from the Greater New York Funds, that you had certain benefits?

A. Oh, yes.

Q. To which you were entitled?

[9] A. Yes.

Q. And you are now a participant in the Southern Pension and Welfare Funds, is that correct?

A. Yes.

Q. And you are entitled to certain benefits under those funds, is that correct?

A. Yes.

Q. As far as you know, are the benefits approximately comparable?

A. I wouldn't know exactly.

Q. But as far as you know, are they about the same?

A. They were promised to be the same, yes.

Q. And you have no reason to think that they have not kept their promise, is that correct?

A. No.

Q. Is there any benefit to which you are entitled under the Greater New York Funds which you have been denied?

A. Not that I know of.

* * * *

[11] Q. Mr. Wizner, you were a participant, were you not, under the Greater New York Pension Fund for more than ten years, were you?

A. Yes.

Q. Are you aware that after ten years of participation in the Greater New York Pension Fund, you have a vested right in a pension under that fund?

A. Yes.

Q. You have been told that, have you?

A. Yes, I have been told that.

Q. Has anyone told you that you won't get that pension that you have a vested right to?

A. No.

Q. From the Greater New York Pension Fund?

A. No.

Q. Do you have any reason to doubt that you will get the pension, the vested pension that you are entitled to from the Greater New York Pension Fund?

[12] A. Not that I know of.

Q. You are aware that you are a plaintiff in this action, Mr. Wizner, are you not?

A. Yes.

Q. And as a plaintiff in this action, you have made certain allegations along with the other plaintiffs in this action, have you not?

A. Yes.

Q. One of the allegations made on your behalf as well as other plaintiffs is paragraph 45 of the complaint which I would ask you to read, please, and then I will address a question to you.

A. As are known to me—

Q. Have you read paragraph 45?

A. I read this, yes.

Q. Mr. Wizner, having read paragraph 45, I want to particularly call your attention to the words on the fourth and fifth lines thereof, and I call your attention to the past tense, "Plaintiffs have been deprived," and I would like you to tell me how you, as one of those plaintiffs, how you have been deprived. Take into account the whole paragraph as you have read it.

A. Well, it means the transfer of rules, [13] obligation to plaintiff. They were supposed to transfer the money. If they don't transfer the money, then according to me, if they don't have the money, they can't pay me out. That I think pertains to me. If there is no money, they can't pay me.

Q. Mr. Wizner, I call your attention again to the words. It says you, among the other plaintiffs, have been deprived. You have been deprived already and my question to you is, how have you been deprived to date?

A. Up to date? Not yet.

Q. Thank you very much. Not yet.

Mr. Wizner, after your employer, together with the other contributing employers to the Southern Funds, established the Southern Funds, were there some communications to you and other participants about the establishment of those funds?

A. Yes.

Q. What form did that communication take? Was it orally or was it in writing?

A. No, it was in writing. We have pamphlets.

[14] Q. You received pamphlets from them?

A. Yes.

Q. Do you recall whether the benefits you were promised by the Southern Funds were conditional upon their getting money from the Greater New York Funds?

A. Not that I remember exactly, but it was supposed to be the same or better.

Q. It was supposed to be the same level of benefits?

A. Yes.

Q. But did they tell you that you will get these benefits, but only if we get some money from the Greater New York Funds?

A. Yes.

Q. They did tell you that?

A. Yes.

Q. They told you that in writing?

A. And it was in writing too. They said the Greater New York was supposed to transfer over.

* * * *

Exhibit 9

Deposition of plaintiff Yvonne Fernicola, conducted on March 31, 1987 (p. 3, 8, 11-15)

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[3]

March 31, 1987

11:50 a.m.

Deposition of YVONNE FERNICOLA, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

* * * *

[8] Q. Would you please more fully identify yourself, give your name, address, where you work and the workplace address.

A. It's Yvonne Fernicola, I live at 36-29 22nd Street, Bayside. I work at Franklin Nursing Home, 127-47 Franklin Avenue, Flushing 11355.

Q. Ms. Fernicola, you are a plaintiff in this lawsuit, are you not?

A. Yes.

Q. How long have you been an employee of the Franklin Nursing Home?

A. February 1976.

Q. Had you been an employee of any other nursing home before that?

A. No.

* * * *

[11] Q. As far as you know, are the benefits under the Southern Funds approximately the same as the benefits you had under the Greater New York Funds?

A. To my knowledge, yes.

Q. Is there any benefit to which you were entitled under the Greater New York Funds which you have been denied?

A. No.

Q. Do you know of any other participant or employee who was entitled to a benefit under the Greater New York Funds who was denied that benefit?

A. Not to my knowledge.

Q. Has anybody told you, Ms. Fernicola, that you will not receive any benefit to which you may be entitled under the Greater New York Funds?

A. No.

Q. Do you have, independent of anybody telling you such a thing, do you have any reason to believe that you might not receive any benefit to which you are entitled under the Greater New York Funds?

A. No.

[12] Q. Has anybody told you that you might not receive any of the benefits to which you are entitled under the Southern Funds?

A. No.

Q. Do you have any reason to believe that, for whatever reason, that you might not receive the benefits to which you are entitled under the Southern Funds?

A. No.

Q. To the best of your knowledge, do any of your fellow employees have any doubts as to whether they will receive benefits to which they are entitled under the Greater New York Funds?

A. Not to my knowledge.

Q. Again to the best of your knowledge, do any of your fellow employees have any doubts as to whether or not they will receive any of the benefits to which they are entitled under the Southern Funds?

A. Not to my knowledge.

Q. Ms. Fernicola, you are aware, are you not, that as a plaintiff in this action, you, together with the other plaintiffs, have made certain allegations in the third amended complaint [13] filed in this action?

A. Yes.

Q. I would ask that you read paragraph 45 of the third amended complaint before I ask the next question. Have you read paragraph 45 of the complaint?

A. Yes.

Q. I refer now only to—I notice you turned the page, so I call your attention to the fact that paragraph 45 of the complaint consists of eight lines only on page 16 of the third amended complaint.

Having in mind that paragraph in its entirety, but calling your attention specifically to the fourth and fifth lines of that paragraph, specifically to the words, "Have been deprived," in the past tense, I ask you how you, among the other plaintiffs, have been deprived under that.

A. We have been deprived of transfer of the monies to the Southern Association to, in turn, give us an insurance of better having—making it easier for them to pay out what has to be paid out.

[14] Q. Who is "they"?

A. The Southern Association.

Q. The Southern Association. You mean the—

A. We have been deprived of transfer.

Q. Who is "we"?

A. We, the people, me.

Q. You as a participant?

A. As a participant, as an employee.

Q. To this date you feel you have been deprived as of now, is that correct?

A. That is correct.

Q. Is it your claim by virtue of this language that you have been injured in some way? You, as of this date.

A. Injured in the sense of transfer.

Q. How have you been injured? You have testified, have you not, that you have not been denied any benefit from either the Greater New York or the Southern Funds, is that correct?

A. That's correct.

Q. So, would you explain to me how you have been injured, if you feel you have been injured.

[15] MR. REILLY: The witness has already answered the question once. It is on the record.

Q. Would you answer it, please.

A. In the sense that it's a type of insurance that, in the long run, it may affect us.

Q. In the future?

A. Yes.

Q. But to date do you feel you have been injured?

A. No.

Q. Since the establishment of the Southern Funds, what communications have you received regarding those funds?

A. Nothing.

Q. Nothing orally or in writing?

A. No.

Q. How do you know that you are entitled to benefits under the Southern Funds?

A. It was talked about during the changeover, but briefly.

Q: It was talked over by who?

A. The union.

* * * *

Exhibit 10

Deposition of plaintiff Anita Harris, conducted on March 31, 1987 (p. 3, 8-14, 16-17)

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[3] March 31, 1987

2:15 p.m.

Deposition of ANITA HARRIS, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

* * * *

[8] Q. Would you more fully identify yourself for the record, give your name, address, where you work and your work address.

A. My name is Anita Harris, I live at 3030 Ocean Avenue, Brooklyn, New York, I work at Seacrest Health Care Center, 3035 West 24th Street in Brooklyn, New York.

Q. How long have you worked for Seacrest Nursing Home?

A. I have been employed there since October 28, 1974.

Q. Did you work for any other nursing home before that?

A. No, I did not.

Q. And you continue to work for Seacrest Nursing Home?

A. Yes.

Q. During some of that period from 1974 forward, you were, were you not, a participant in the Local 144 Nursing Home Pension Fund and New [9] York City Nursing Home Local 144 Welfare Fund?

A. Yes.

Q. For the record, we are going to refer to those two funds as the Greater New York Funds.

What period of time, what approximate dates were you a participant in those funds, in the Greater New York Funds?

A. I'm not sure when I started to be a participant. I would say—I'm not too sure of the dates.

Q. Approximately.

A. Approximately maybe '75, 1975. What month, I have no idea. Until approximately a year and a half ago, two years ago.

Q. What happened a year and a half or two years ago?

A. When we now became involved in the Southern Statē Nursing Home Association.

Q. During the period that you were a participant in the Greater New York Funds, you were entitled to certain benefits under those funds, were you not?

A. I was.

Q. Were you ever denied any benefits to [10] which you were entitled by those funds?

A. No.

Q. Have you been denied any benefits to which you are entitled from the Greater New York Funds since you no longer are a participant in them, or since your employer ceased to contribute to them?

A. I want you to explain that.

Q. Well, let me try.

You indicated that you were a participant until a year and a half or two years ago in the Greater New York Funds.

A. Right.

Q. And you have already answered with regard to the period prior thereto.

My question now relates to the period from that time to date. During that year and a half to two years that you are referring to, have you been denied any benefit to which you are entitled from the Greater New York Funds?

A. I no longer receive benefits from the Greater New York. I only receive my benefits from the Southern State.

Q. When you say you receive your [11] benefits, you are referring both to the welfare plan and to the pension plan?

A. Well, I'm not on the pension, but yes, the welfare plan.

Q. Do you know whether or not you had what is referred to as a vested benefit?

A. I did have a vested benefit.

Q. In the Greater New York Pension Fund?

A. Yes.

Q. Has anybody told you that you no longer have a vested benefit?

A. No.

Q. So you are still entitled to a vested benefit under the Greater New York Pension Fund?

A. Yes.

Q. And you fully expect to receive that benefit when it becomes payable, do you not?

A. I guess. Yes, I do.

Q. I am now going to refer to the Local 144 Southern New York Residential Health Care Facilities Association Pension Fund and the Local 144 Southern New York Residential Health Care Facilities Association Welfare Fund and I am going to refer to those as the Southern Funds. [12] You are now a participant in the Southern Funds, are you not?

A. Yes, I am.

Q. As far as you know, are the benefits under this Southern Funds approximately the same as what they were under the Greater New York Funds?

A. They are equal.

Q. You said a few minutes ago that you have not been denied any benefit to which you are entitled from the Greater New York Funds.

A. Correct.

Q. Do you know of any other employee of a Southern employer who was denied any benefits to which he or she was entitled from the Greater New York Funds?

A. No, I do not.

Q. Has anybody told you that you won't receive the benefits that you are entitled to under the Greater New York Pension Fund?

A. No.

Q. Has anybody told you that you won't receive the benefits to which you are entitled under the Southern Funds?

[13] A. No.

Q. Do you have any reason to believe, other than being so told, do you have any reason to believe that you will not receive the benefits that were promised to you from either the Greater New York—let's try one at a time—from the Greater New York Funds?

A. No.

Q. Do you have any reason to believe that you will not receive the benefits promised to you to which you are entitled under the Southern Funds?

A. No.

Q. As far as you know, do you know of any of your fellow workers who feel that they have any reason to believe that they will not receive benefits to which they are entitled either from the Greater New York Funds or to which they are entitled under the Southern Funds?

A. Not that I am aware of.

Q. You are a plaintiff in this action and you know that by reason of being a plaintiff in this action, you, together with the other plaintiffs, have made certain allegations in the [14] third amended complaint filed in this civil lawsuit, right?

A. Right.

Q. I am going to call your attention to paragraph 45 of the third amended complaint and ask you to read it.

A. I have.

Q. Within that paragraph I call your attention specifically to lines 4 and 5 and specifically to the words "have been deprived," noting that that is past tense.

I ask you, in the context of the entire paragraph, how you, among the other plaintiffs, how you have been deprived in the sense of this paragraph.

A. Well, monies have been put aside by my employer for me to the Greater New York Nursing Home Funds, or whatever the exact words are. This money—these monies were never transferred on my behalf.

Q. Ms. Harris, I am calling your attention to the past tense and I am asking you how you have been deprived.

* * * *

[16] MR. REILLY: You are attempting to mislead the witness.

MR. ROSE: I would ask that the question be read back.

(Record read)

MR. REILLY: Let me listen to it as reread.

MR. REILLY: So that I am clear, when you ask how have you been injured or deprived, are you still referring to paragraph 45 in the context as set forth there?

MR. ROSE: I am.

MR. REILLY: The witness should be aware that is the context.

Q. I am talking about the context of paragraph 45, have no mistake about that, and my question to you is, how have you been injured or deprived, you personally? You are one of the plaintiffs. How have you been injured or deprived to date?

A. This money was contributed on my behalf from the time I became a member of the [17] Greater New York Nursing Home Association. By the time I became a member of Local 144, this money, when I did not choose to have the break in the Southern and the Greater, this money did not go along with the Southern State. This money was invested in my behalf.

Q. How have you been injured by that to date?

A. By the fact that this money was not transferred. That is the only way that I know that I have been injured.

Q. You understand that you are under oath?

A. I do.

Q. During the years that you were a participant in the Greater New York Funds, did you ever receive any communications about the terms of either or both of those funds?

MR. REILLY: I am going to object. I don't see the relevance to this witness's understanding as to whether or not she received any communications.

MR. ROSE: Whether there has been injury or not will affect standing and what (sic)

* * * *

Exhibit 11

Deposition of plaintiff Mary Lindsay, conducted on March 31, 1987 (p. 3, 7-8, 10-11, 14, 19)

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[3]

March 31, 1987

2:45 p.m.

Deposition of MARY LANDSAY (sic), taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

* * * *

[7] Q. Ms. Lindsay, how long have you worked at Shoreview Nursing Home?

A. I have worked there 18 years, since July of 1969. I think that is 18 years.

Q. And during much of that period of time you were a participant in the Greater New York Funds? And by that I mean the Local 144 Nursing Home Pension Fund and the New York City Nursing Home Local 144 Welfare Fund?

MR. REILLY: Before the witness answers, I just want to make one thing clear.

I presume when you use the term "participant," you are not asking for the witness to draw any legal conclusions and you are simply asking her to give you a factual response to the extent she interprets the term "participant"?

[8] MR. ROSE: Yes, I agree on that.

Q. I am referring to those two funds as the Greater New York Funds and my question to you is: Did you

participate in those two funds for much of that 18-year period?

A. Yes, I was a member of the Local 144, yes.

Q. Well, you were a member of Local 144 as a union, but I am referring to participating in the welfare fund and the pension fund which were sponsored by the Greater New York Funds.

Do you understand that they are different entities?

A. I know the difference, yes.

Q. Is it true that you were a participant in the Greater New York Funds for many years?

A. Yes.

Q. Do you know approximately which those years were, from what year to when?

A. It would be from the time they set it up in the nursing home because I was there when the nursing home opened.

* * * *

[10] Q. Would you please respond.

A. Yes.

Q. As far as you are aware, are the benefits to which you were entitled under the Southern funds approximately the same as the benefits to which you were entitled under the Greater New York Funds?

A. Yes.

Q. Have you been denied any benefit to which you are entitled under the Greater New York Funds?

A. No.

Q. Have you been denied any benefit to which you were entitled under the Southern Funds?

A. No.

Q. Do you know of any other employee of a Southern employer who has been denied benefits to which he or she was entitled under the Greater New York Funds where the denial was because of the withdrawal of the employer from the Greater New York Funds?

MR. REILLY: Can I have that question read back before it is answered.

[11] I didn't quite get it.

(Record read)

MR. REILLY: If she can answer the question, she can do so.

A. Not to my knowledge.

Q. Do you know of any other employee who has been denied benefits to which they are entitled, for any reason, from either the Greater New York Funds or the Southern Funds?

A. I don't understand the question

Q. Do you know of any employee of a Southern employer who has been denied benefits to which that person is entitled from the Greater New York Funds?

A. No.

Q. Do you know of any employee of a Southern employer who has been denied benefits to which he or she is entitled from the Southern Funds?

A. I would like to ask a question, because I don't quite understand something.

Q. If you don't understand it, please say so.

A. I don't want it, you know—

* * * *

[14] Q. When did this happen?

A. I told you before, within the last two or three years.

Q. Do you know whether or not the claims that you are referring to where there was this difficulty were claims under the Southern Fund?

A. It was like in the transition. It was like in the transition from one to the other.

Q. Has anybody told you that you won't receive benefits to which you are entitled from the Greater New York Pension Fund?

A. No.

Q. Has anybody told you that you won't receive benfits to which you are entitled to receive from the Southern Pension Fund?

A. No.

* * * *

[19] Q. The education fund is not involved in this lawsuit now.

A. Well, maybe I don't understand it.

Q. Can you think of any in which you have been injured so far?

A. By the monies staying in Greater New York Fund?

Q. Yes, to this date.

A. Well, the assets that we would benefit by the monies and raises, it would be for the benefit of the employees. Anything that derives from the monies that we put in, the interest and what you have you would be for our benefit.

Q. Are you of the opinion that it would change your benefits?

A. Yes.

* * * *

Exhibit 12

Deposition of plaintiff Ernest Dicker, conducted on March 31, 1987 (p. 3, 7-16, 19-29, 31-35)

[3] March 31, 1987

10:10 a.m.

Deposition of ERNEST DICKER, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

* * * *

[7] Q. And, in addition, that the testimony you give today may be introduced at the trial or it may be used in connection with motions that may be filed in connection with this civil action.

Is that understood?

A. Yes.

Q. You also understand, do you, that the testimony—the scope of the testimony you are giving today is somewhat limited in scope and, therefore, it may be necessary for you to testify at a later point again.

Do you understand that?

A. Yes.

Q. Mr. Dicker, would you more fully identify yourself, your name, address, your business, business address.

A. My name is Ernest Dicker, 209-28 28th Avenue, Bayside, New York. I'm the executive director of the Clearview Nursing Home, Shoreview Nursing Home and Seacrest Health Care Center.

Q. Mr Dicker, you are, are you not, a trustees of the Local 144 Southern New York [8] Residential Health Care

Facilities Association Pension Fund and a trustee of the Local 144 Southern New York Residential Health Care Facilities Association Welfare Fund?

A. I am.

Q. For convenience, those two funds will be referred to as the Southern Funds.

Mr. Dicker, you have been trustee of the Southern Funds for how long?

A. Since its inception.

Q. When was that?

A. I believe in the latter part of 1985.

Q. You are a plaintiff in the civil action in connection with this deposition which is being taken, and you are a plaintiff in two capacities, is that correct?

A. I believe so.

Q. You are a plaintiff as trustee of the Southern Funds?

A. Yes.

Q. And you are also a plaintiff as a contributing employer to the Southern Funds, is that correct?

A. That is correct.

[9] Q. There was a period of time, was there not, Mr. Dicker, when you were a contributing employer to the Greater New York Funds, and by the Greater New York Funds I refer to here and elsewhere to the Local 144 Nursing Home Pension Fund, New York City Nursing Home, and Local 144 Welfare Fund? You were a contributing employer to the Greater New York Funds, were you not?

A. Yes.

Q. Would you state for the record for what period of time you were a contributing employer to the Greater New York Funds?

A. For Clearview Nursing Home, from the year 1964; for Shoreview Nursing Home, since 1969; and Seacrest Health Care Center since 1974.

Q. Mr. Dicker, were you ever a trustee of either of the Greater New York Funds?

A. No.

Q. You are aware, are you not, Mr. Dicker, that as plaintiff in your two capacities in this lawsuit, you have made certain allegations in the third amended complaint?

A. Yes.

Q. Are you aware, Mr. Dicker, of any [10] employer withdrawing from the Greater New York Funds other than yourself and the other Southern employers?

A. No.

Q. Are you acquainted with any employer who has withdrawn from any multi employer-employee benefit fund?

A. No.

Q. Are the Southern Funds a plaintiff in this action?

A. Not that I know of.

Q. Are you aware that they were before the third amended complaint?

A. I believe they were. I think they were.

Q. Since you are a member of the board of trustees, since the inception of the Southern Funds, what discussions took place among the board of trustees with regard to the participation of the Southern Funds as plaintiff in this action?

A. I don't recall if it was during the time when we were trustees, but I recall there were discussions with the union trustees that they were not going to fight us in having the separate [11] funds. In fact, they said they will not fight against us.

I mean, that they would let us go to get the carve-out from the Greater New York.

Q. But as a member of the board of trustees, did not the board discuss this issue?

A. I honestly don't know whether it was at a board meeting or at times of negotiating when they were—when there was a strike.

Q. I show you page 18 of the third amended complaint and ask you what is the date of the document?

A. November 19, 1986.

Q. Since the Southern Funds were plaintiffs until that date, does it refresh your recollection whether or not

there were discussions among the board of trustees to change the status of the Southern Funds?

MR. REILLY: Objection. The witness hasn't so testified that Southern Funds were plaintiffs up until that particular date. His testimony, just so the record is correct, he says he believes they previously were a plaintiff. He didn't [12] give any time frames.

Q. What is your best recollection, Mr. Dicker, as to when Southern Funds were plaintiffs?

A. I don't recall exactly when.

Q. When was the action originally filed?

A. I believe—now I'm guessing, I don't recall the exact date when, I know we had other attorneys that were handling it and I imagine it must have been in either '85 or '86. I don't recall exactly when.

Q. But there was a change, was there not, from the status of the Southern Funds originally in the lawsuit and the third amended complaint?

A. Well, I recall that the union trustees had notified the management trustees that they did not want to be a plaintiff to this action, so, therefore, there would only be the management trustees to be the plaintiffs. Whether it was changed at that time because of not being—that the Southern Funds could be, that perhaps maybe was the time, but I remember distinctly the union trustees writing to management trustees that they didn't want to be a [13] plaintiff.

Q. Did the trustees of the Southern Funds ever authorize the Southern Funds to be plaintiffs in this action?

A. I honestly don't recall.

Q. Did they ever vote on it?

A. I don't recall them ever voting on it.

Q. They couldn't authorize it without a vote, could they?

A. That is correct.

Q. How do you explain that they were, indeed, plaintiffs in this action until the third amended complaint?

A. I can't.

Q. You don't recall a discussion of the board of trustees which resulted in the change, that is, the removal of the Southern Funds as plaintiffs in this action?

A. I don't remember discussing it with the union trustees. I remember discussing it with the management trustees and we decided to—for the management trustees to go it alone.

Q. Mr. Dicker, you are aware, are you [14] not, of an established procedure of the Southern Funds when there is a disagreement among the trustees as to how a decision is made?

A. Yes.

Q. What is that procedure?

A. If there is a deadlock, we go to arbitration.

Q. That did not happen in this case, did it?

A. That's correct.

Q. Can you explain why?

A. There was no vote.

Q. Has the board of trustees of the Southern Funds at any time ratified the bringing of this lawsuit on its behalf?

A. I don't recall whether they ever ratified it.

Q. It would be in the minutes, would it not, if they had?

A. Yes.

Q. Do you have copies of all the minutes?

A. Personally not, but the Funds have.

Q. Do you recall it ever coming to a [15] vote?

A. No.

Q. You and the other Southern employers agreed to establish the Southern Funds, did you not?

A. Yes.

Q. Why did you do so?

A. Because we felt that together with the union, we would be fair to workers since we knew the Greater New York and the Local 144 and the other funds were playing games, to use the colloquialism, with other employers by giving special deals or not paying or paying very little, and it was not fair—

Q. Please just answer my question as to why you set up the Southern Funds.

MR. REILLY: I think the witness was answering the question, Mr. Rose.

Q. Proceed.

A. Well, that would be because I personally felt that there was unfairness.

Q. Well, would it be fair to say that the question you were just answering is why you withdrew from the Greater New York Funds rather [16] than why you set up the Southern Funds?

A. No, it was jointly, because we set it up to be able to make sure that the workers would be getting their rightful benefits.

Q. But your dissatisfaction that you have expressed, I assume that—am I correct in that that was part of the reason why you withdrew from the Greater New York Funds?

A. Yes.

Q. Once having withdrawn from the New York funds, why did you set up the Southern Funds?

A. It was done—it is a joint action. In other words, we didn't withdraw from the Greater New York Funds and then separately decide. It was jointly decided to set up another fund, separate funds together with the union and then simultaneously withdraw from the other funds.

Q. When did you withdraw from the Greater New York Funds?

A. As far as I can recall, on the welfare, it was approximately October, I think, of 1985, paid until approximately that time. On the pension fund I think it was until June or July of 1984, I believe, if I am not mistaken.

* * * *

[19] Q. When did you establish the Southern Pension Fund?

A. I don't remember. We set it up—I don't recall exactly when—but it was subsequent to those dates. I don't remember exactly when.

Q. Was it not more than a year later?

A. I'm not certain as to when, but approximately a year later.

Q. So there was an interval, it was not simultaneously, between the withdrawal and the establishment of the Southern Funds, isn't that correct?

A. Yes.

Q. The establishment of the Southern Funds was a decision you and your colleagues, Southern employers, made, albeit as a result of collective bargaining with the union, isn't that correct?

A. Could you repeat the question.

MR. ROSE: I will ask that it be reread.

[20] (Record read)

A. We agreed with the union to jointly make it, to make separate funds, but the union just dragged it and kept preventing the formation, so we formed it ourselves to protect the workers, if I recall correctly.

Q. Mr. Dicker, it was the decision of you and your colleague employers, is that correct?

A. Yes.

Q. And the terms of the Southern Funds also was the result of the decision of you and your colleague Southern employers, is that correct?

A. Subject to provisions of the agreement that we had with the union.

Q. Albeit, that it was pursuant to collective bargaining?

A. Pursuant to our individual facilities' agreements with the union.

Q. But the decision was yours whether or not to have a fund and the terms of that fund, albeit those decisions were subject to collective bargaining?

A. Yes.

[21] MR. REILLY: What point of time are we talking about now?

MR. ROSE: The point in time when these decisions were made between the middle of 1984 and the establish-

ment of the Greater New York Pension Fund, he testified, about a year later, more than a year later.

A. Could I correct something.

Q. Sure.

A. You said it was a year later. Let it be known that the contract that we signed with the union was first, if I recall, November 30, 1984. So anything that was dated July of 1984 that we first started paying the escrow funds to the Greater New York—excuse me, to the Southern 144 Fund, so it is not a year later because many things were done backdated to the agreement. Do you understand me?

Q. Yes.

A. It was not a year from the time we put money in escrow until the time we set it up. Really you have to take from the time we actually signed the contract to when we set it up. Just a [22] technical difference.

Q. Let's try to clarify this point. If I understand you correctly, you are saying that the establishment of the Southern Pension Fund was retroactive?

A. That is correct.

Q. That is what you are saying?

A. Yes.

Q. But it was not actually established until more than a year later?

A. From that date we agreed on, that is correct.

Q. I am talking about from the date of your withdrawal from the Greater New York Pension Fund.

A. Correct, you are right.

Q. In the course of these discussions leading to the establishment of the Southern New York Funds, you had discussions among the Southern employers, did you not, as to whether or not to do so?

A. Yes.

Q. And further, once it was decided to have the Southern Funds, you had discussions, did [23] you not, among yourselves as to what the terms the level of benefits should be for those funds?

A. Yes.

Q. One of the terms in connection with the Southern Pension Fund was, was it not, as to whether or not to give credit for service of employees prior to the establishment of the Southern Pension Fund?

A. Yes.

Q. You had the choice of doing that, of giving such past service credit or not, but you finally decided to do so, is that correect?

A. I don't know if we had the choice. I think we discussed it with the union and they were insisting on it.

Q. Well, the union insists on a number of things. That doesn't mean that you don't have a choice if you are not willing to agree to a collective bargaining agreement on that point, isn't that correct?

A. Yes, but I believe we agreed with the union to give that.

Q. You had agreed as a matter of contract?

[24] A. On the contract, yes, with our agreement. In order to have the funds, there would be continued benefits for the workers.

Q. So the decision as to giving past service credit actually was made at an earlier point when you entered into the contract with the union, in effect?

A. That is correct.

Q. You knew you had a choice whether or not to agree with the union on that point?

A. Well, no. We didn't have a choice because otherwise we would not be able to settle the strike.

Q. You made that decision in order to settle the strike?

A. That is correct.

Q. You gave past service credit in order to settle the strike?

A. Yes, that was one of the reasons.

Q. What other reasons?

A. There were other things negotiating with the contracts.

Q. There were other points that you had to negotiate?

[25] A. Right. That wasn't the only thing.

Q. Mr. Dicker, you have brought this action as a plaintiff in your two capacities, that is as a trustee and as an employer, because you felt that you had been injured, is that correct?

A. Not me personally, but my organizations could be injured because—that money that we put away that was paid for our workers would be dissipated by those other funds.

MR. ROSE: I would ask that the question be reread.

Q. I ask you to respond to it.

(Record read)

A. Technically, yes.

Q. I would like you to explain to us for the record what that injury is to you as a trustee and then to explain what that injury is to you as an employer.

A. Well, first as a trustee, is that we have committed to give the workers, first of all, continuous benefits and to give credit for the past service.

As a trustee, if a worker worked, as I understand it, for Greater New York Funds less [26] than ten years, they will not get credit for that, and we in the Southern Funds have agreed to pay for those years. In other words, if Greater New York, if they worked seven years and three years for the Southern Funds, the Southern Funds are obligated to pay for the full ten years and that would be a big cost to our funds. As a trustee that hurts us.

Also not as a trustee, if we get our carve-out, to get what the employers of the Southern Fund had previously paid to Greater New York and if it could be paid out, paid to give into the Southern Funds, that money could earn money and give the benefits to the workers. It is—as far as an employer, we have—we have been paying the full amount in all the years for Clearview and Shoreview to substantiate the correct amount for Seacrest and the same basic principle as I stated, the last part, that is we have been paying while we know other places have not paid the full amount or not paid any, and we want

that money we paid for the workers to go to the benefit of our workers, not to other employees' benefits.

[27] Q. Let me try again. You are suing in this action as a trustee of the Southern Funds and I would like you to explain to me how you have been injured in that capacity.

A. How—up to now?

Q. How you have been injured as a trustee of the Southern Funds. That is the capacity in which you are suing, one of them.

A. I know of one former worker for Shoreview that Greater New York says they are not going to pay until she is 65 years old and we in Southern Funds feel that we are obligated to pay for that person for the "X" number of years until she is 65 because of the continuity of the benefits that she is entitled to. That has taken money. I'm custodian of the money, from—that is, taking money from the other employers, not paid by the other employers, for the benefit of all the other workers. I don't think that is fair, just to mention one matter.

Q. Do I understand correctly that your answer is that the Southern Fund is injured?

A. Yes.

Q. But you as a trustee are not injured?

[28] A. Since I represent them as trustee, I feel that I am injured too.

Q. Are you doing this in a representative capacity?

A. No. In fairness, I would say I think I represent the Southern Funds and I feel, as a trustee, that we should get that money, yes.

Q. Please let me see if I can clarify this. You are suing on behalf of the Southern Funds and it is the Southern Funds' injury that you are relating to us now, is that correct?

A. Well, my fiduciary position, I feel it is my fiduciary position that it is incumbent upon me to protect the assets of the Southern Funds and to get whatever is due them and to protect their money so that it is for the benefit of the employees.

Q. Let's move to your capacity as an employer now. Would you explain how you are injured in your capacity as an employer.

Let me repeat that.

Would you explain how you have been injured in your capacity as an employer.

[29] A. In being with the Greater New York, is that what you are trying to bring out?

Q. No. You have made allegations in this complaint that you have been injured.

A. Right.

Q. I want you to explain for us, please, how you have been injured, exactly, as an employer.

A. We have been injured because unless we get the carve-out money, what is due and fair, what we paid in all these years for our employees, that our employees would not get the proper amount of that pension or benefits that they are entitled to, because we know for a fact that other facilities that are still in Greater New York have not paid—

Q. Mr. Dicker, please listen to my question carefully. The allegation in the complaint is that you have been injured, past tense, and I would like you to explain, please, how you have been injured as an employer.

A. I think I have been answering it.

* * * *

[31] Q. I invite you to read the whole paragraph. I am emphasizing the verbs.

A. You are saying how I'm being deprived if there is no transfer, is that what you are saying?

Q. I am emphasizing—I am asking you how you have been deprived, in that sentence.

A. By not—by the Greater New York and Local 144 depriving us of the carve-out.

Q. I want to know how you have been deprived. We are talking about you as an employer.

A. I have been deprived because if my—if the Southern Funds would have the money, they would be earning the money on that money and then the chances would be

that possibly we may be able to pay a smaller contribution to the funds and to give the same benefits to these workers. So that is one method that we have been deprived of.

Q. Getting back to your capacity as a trustee. How have you as trustee been deprived, [32] in that same paragraph?

A. As trustee, the same principle. If they have that money, then we could give possibly the workers even greater benefits, or else, you know, have the money so that this way we know it wouldn't be dissipated. We know for a fact that it has been dissipated a great deal in the other funds.

Q. What has that got to do with my question, dissipation? I'm not sure I understand that.

My question is how you have been deprived in the context of paragraph 45 of your complaint.

A. Well, I have been deprived, if we don't have custodians for that money, then we have concern that the money would be wasted and when it comes to the benefits, it is time to give the workers the benefits, there would not be adequate money to pay the workers, and that we, in the Southern Funds, would have to make it up then.

Q. Mr. Dicker, I call your attention to the verbs in that sentence again, it says "have been deprived." It has happened. What has [33] happened again?

MR. REILLY: If you want to call attention to the verbs, call attention to the whole paragraph.

MR. ROSE: He has it in front of him and I invite him to read the whole paragraph.

A. I don't understand you any more than what I just said. I think I have explained it properly.

Q. Mr. Dicker, when you and your colleague employers who contributed to the Southern Funds agreed to pay certain benefits, you also were agreeing, were you not, to pay for those benefits?

A. Yes.

Q. So that your agreement to pay for those benefits would be adequate to pay for that level of benefits you were agreeing that the funds should pay, is that correct?

A. But the exception, we had full intention that we would be getting the carve-out from the other funds that we had paid in over the years. It was presumed, that.

[34] Q. Are you putting on the record right now under oath that you agreed to pay—that the funds should pay a level of benefits which your contributions to those funds would not adequately pay, adequately finance?

A. No. We had actuaries that said they could afford to pay.

Q. You had before you an actuarial report showing the contributions you were agreeing to pay that would finance the benefits that you were agreeing that the funds should pay to the participants?

A. That is correct.

Q. That would be without any additional funds of a transfer from the Greater New York Funds, is that correct?

A. That is correct.

Q. So that any funds you got from the Greater New York Funds would be extra?

A. It would be additional money, yes.

Q. Mr. Dicker, are you aware that as a contributing employer to the Southern Funds, you have agreed to the terms of the trust agreement of the Southern Funds?

[35] A. Yes.

Q. Similarly, you are aware, are you not, that during the period that you were a contributing employer to the Greater New York Funds, you were obligated contractually to the terms of the Greater New York trust agreement?

A. Yes.

Q. Are you aware that one of the provisions that you acknowledge you were obligated contractually to adhere to while you were a contributing employer to the Greater New York Funds, was one that stated that no employer shall have any rights—the quote begins, "No employer shall have any rights, title or interest in or to the funds or other property of the trust fund or any part thereof"?

A. Yes.

Q. Mr. Dicker, you understand, do you not, that as a trustee of the Southern Funds, you are a fiduciary of those funds?

A. Yes.

* * * *

Exhibit 13

Deposition of plaintiff Joseph Unger, conducted on April 2, 1987 (p. 3, 7-8, 19, 21, 40, 43)

[3]

April 2, 1987

10:25 a.m.

Deposition of JOSEPH UNGER, taken by Defendants and Counterclaim Plaintiffs, pursuant to notice, at the offices of Epstein, Becker, Borsody & Green, P.C., 250 Park Avenue, New York, New York, before Robert Capuzelo, a Shorthand Reporter and Notary Public within and for the State of New York.

* * * *

[7] Q. Would you please identify yourself more fully for the record, Mr. Unger, give your name and address, your business and business address.

A. My name is Joseph Unger. I'm the administrator of American Nursing Home at 62 Avenue B, New York City 10009.

Q. Will you give your home address.

A. I would rather the business.

Q. I think for the record you should give it.

A. 1887 48th Street, Brooklyn.

Q. Mr. Unger, you are a contributing employer to the Southern Funds? And by Southern Funds I am referring to the Local 144 Southern New York Residential Health Care Facilities Association Pension Fund and the Local 144 [8] Southern New York Residential Health Care Facilities Association Welfare Fund.

A. Yes.

Q. And how long have you been a contributing employer to those funds?

A. Over a year.

Q. How much over a year?

A. Sometime in '85. '84 or '85.

Q. And before that were you a contributing employer to the Greater New York Funds? By Greater New York Funds I am referring to the Local 144 Nursing Home Pension Fund and the New York City Nursing Home Local 144 Welfare Fund.

A. Yes.

Q. For what period of time, Mr. Unger, were you a contributing employer to the Greater New York Funds?

A. American Nursing Home has been in since about 1970 and so on every year afterwards.

Q. American Nursing Home, do I understand, has been a contributing employer to the Greater New York Funds from about 1970 until when?

A. About '85.

* * * *

[19] Q. Whatever the levels of benefits were, did you not agree with the other employers and ultimately with the union to make contributions to those funds which finance those benefits?

A. Yes.

Q. Those contributions were to be adequate to provide that level of benefits? That would be presumably the prudent thing to do?

MR. REILLY: I am going to object in the sense that now you have asked a question and you have added to it a personal observation.

MR. ROSE: Indeed I have. I will withdraw that.

MR. REILLY: What have you withdrawn? The personal comment or the question?

MR. ROSE: The personal comment.

A. Can you repeat it?

MR. ROSE: Mr. Reporter?

(Record read)

* * * *

[21] MR. REILLY: Objection. The question presumes that the witness has read the trust agreements and he's already answered that he didn't read them.

Q. I understand that you have not read them, Mr. Unger.

Do you know whether or not, independent of having read them, do you know whether or not there is any condition in those documents or anywhere else which condition the providing of benefits under the Southern Funds upon the receipt of money from the Greater New York Funds?

A. I haven't seen—I haven't read the trust agreements.

Q. Apart from your reading of it, do you know of any condition on the providing of benefits by the Southern Funds on the receipt of money from the Greater New York Funds?

A. No.

* * * *

[40] MR. ROSE: I am not misstating anything.

Q. I am asking you that question. Are you suggesting that the American Nursing Home is entitled to a portion of the funds of the Greater New York Funds?

A. No.

Q. Do I understand correctly then that the injury to the American Nursing Home is by virtue of the failure of the defendants to transfer money to somebody else other than the American Nursing Home?

MR. REILLY: Can we have who the somebody else is.

MR. ROSE: The Southern Funds.

A. Yes.

Q. Are you, the American Nursing Home here, in a representative capacity on behalf of the Southern Funds?

A. I'm a contributor.

Q. I understand you are. Please answer my question.

A. I don't know.

* * * *

[43] MR. REILLY: No. You asked about any additional injuries. He already gave you—

MR. ROSE: You didn't let me finish my question.

MR. REILLY: Finish.

Q. Whether the American Nursing Home has been injured in any other way in addition to the failure to transfer funds by the defendants to the Southern Funds.

A. I think I explained myself before.

Q. I insist upon a direct answer to my question.

A. As of now, I don't think so.

Q. Mr. Unger, it is so, is it not, that you are not a contributing employer to the Greater New York Funds and haven't been for some time, is that correct?

A. Presently?

Q. You are not and haven't been for some time a contributing employer to the Greater New York Funds, is that correct?

A. Yes.

* * * *

No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,
v.
NICHOLAS DEMISAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The questions presented are:

Whether Section 302(c)(5) of the Labor Management Relations Act, 1947 requires the transfer of assets (without a transfer of liabilities) from a multiemployer benefit plan to a new multiemployer benefit plan established by the same union and certain employers who left the original plan?

Whether Section 302(c)(5) requires such a transfer in circumstances where the transfer would violate the plan's governing trust instruments and/or provisions of the Employee Retirement Income Security Act of 1974, as amended?

LIST OF PARTIES

All of the Appellees in the proceedings below are Petitioners before this Court. In addition to Local 144 Nursing Home Pension Fund, Petitioners include New York City Nursing Home—Local 144 Welfare Fund, and Peter Ottley John Kelley, Austin Cedeno, Frank McKinney, Bartholomew J. Lawson, Fred Wilkens, William McCarthy and Marsha McLendon, as Trustees of the Local 144 Nursing Home Pension Fund and New York City Nursing Home—Local 144 Welfare Fund.

All of the Appellants in the proceedings below are Respondents before this Court. In addition to Nicholas Demisay, Respondents include Ernest Dicker, Jack Friedman and Abraham Grossman as Trustees of the Local 144—Southern New York Residential Health Care Facilities Association Pension Fund and Welfare Fund, Joseph Unger, as executor for the estate of Moses Unger, individually and d/b/a American Nursing Home, Abraham Grossman, individually and d/b/a Bruckner Nursing Home, Lyden Nursing Home and Williamsbridge Manor Nursing Home, B.N.H. Management Associates, Inc., Ernest Dicker, individually and d/b/a Clearview Nursing Home, Seacrest Nursing Home and Shoreview Nursing Home, Nicholas Demisay, individually and d/b/a Clove Lakes Nursing Home, Desdemona Jones Caruso, individually and d/b/a Fieldston Lodge Nursing Home, Jack Friedman, individually and d/b/a Fort Tryon Nursing Home, Franklin Nursing Home, and Friedwald House HRF, Wald Management Associates, Inc., 801 190th Street Management Associates, Inc., and 127-47 Franklin Avenue Management Associates, Inc. Respondents also include Edward Wizner, Martha Mulligan, Elizabeth Metcalf, Ivy Waite, Curlene McIntosh, Anelia Trout, Seena Moreno, Michael Heimur, Pamela Woods, Andrew Lenza, Mary Dibrienza, Euloeia Reyes, Marlene Louis, Mary Mozzolo, Fred Gerillo, Donna Jacobsen, Elsa Rivilla, Helen Leavy, Connie Caruselle, Yvonne Fernicola, David

Pabon, Cynthia Lee, Anita Harris and Mary Lindsay, as participants in the Petitioner funds and Respondent funds and as employees of the various Respondent nursing homes.

The Petitioners have a motion pending before this Court that Frank Russo, Jerome Ottley, Justin Hyppolite, Wiener Volney, William Pascocello and Thomas Haas be substituted in the place and stead of Peter Ottley, John Kelley, Austin Cedeno, Frank McKinney, Fred Wilkens, William McCarthy and Marsha McLendon, who were Appellees in the proceedings below in their capacity as Trustees of the Local 144 Nursing Home Pension Fund and New York City Nursing Home—Local 144 Welfare Fund and were succeeded in May, 1992 by the persons named above.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-610

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 935 F.2d 528, and is set forth in the Appendix to the Petition ("Pet. App.") at 1a. The opinion of the United States District Court for the Southern District of New York is reported at 710 F. Supp. 58, and is set forth in Pet. App. at 13a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 12, 1991. Pet. App. at 1a. On August 21, 1991, Justice Marshall issued

an order extending the time for filing this petition for certiorari to and including October 10, 1991. The petition for a writ of certiorari was filed on October 10, 1991. By order entered June 22, 1992, the petition for a writ of certiorari was granted. By letter dated July 16, 1992, the Clerk of this Court extended the time for filing a brief on the merits to and including August 26, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

This case involves the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1001-1461, and Section 302(c)(5) of the Labor Management Relations Act 1947 ("Section 302(c)(5)" or "LMRA"), 29 U.S.C. § 186(c)(5). Pertinent portions of these laws are set forth in Pet. App. at 32a-55a.

STATEMENT OF THE CASE

A. Statement of the Facts

Petitioners the New York City Nursing Home—Local 144 Welfare Fund ("Greater Welfare Fund") and the Local 144 Nursing Home Pension Fund ("Greater Pension Fund") (collectively the "Greater Funds") are multiemployer benefit funds. Until 1981, the Respondent employers, who are members of the Southern New York Residential Health Care Facilities Association, Inc. ("Southern Employers"), belonged to the Greater New York Health Care Facilities Association, Inc. ("Greater New York Employer Association"), a multiemployer bargaining association. Joint Appendix ("J.A.") at 7, 132. As members of the Greater New York Employer Association, the Respondent employers were obligated pursuant to collective bargaining agreements between the Greater New York Employer Association and Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees

Union, Service Employees International Union, AFL-CIO ("Local 144") to contribute to the Greater Funds on behalf of their employees. J.A. at 7, 133.

In 1981, the Southern Employers withdrew from the Greater New York Employer Association and negotiated individual contracts with Local 144 pursuant to which the Southern Employers continued contributing to the Greater Funds on behalf of their employees. J.A. at 7, 133. On June 30, 1984, the Southern Employers withdrew from the Greater Funds. After a strike, the Southern Employers and Local 144 signed collective bargaining agreements providing for the establishment of the Local 144 Southern New York Residential Health Care Facilities Association Pension and Welfare Funds ("Southern Funds"). J.A. at 29-30.

During the 1984 collective bargaining negotiations with the Southern Employers, Local 144 resisted their withdrawal from the Greater Funds and the establishment of the Southern Funds; the Union warned the Southern Employers that they would have sole financial responsibility for assuring that employees received benefits under the new funds. J.A. at 207-09. Ultimately, Local 144 obtained contractual commitments from each Southern Employer that their employees would lose nothing as a result of the establishment of the Southern Funds. J.A. at 209-10. The collective bargaining agreements between the Southern Employers and Local 144 did not provide for the transfer of any assets or liabilities from the Greater Funds to the Southern Funds, nor were the Greater Funds parties to those agreements. J.A. at 17-48.

Pursuant to a requirement in the 1984 collective bargaining agreements, the Southern Pension Fund trustees voted on November 5, 1985, to grant credited service (earned under the Greater Pension Fund) to their par-

ticipants who had less than 10 years of service and therefore had not yet vested.[1]

The benefit plans involved in this case provide benefits to employees in the nursing home industry, a low wage sector of our economy. Like other health benefit plans, the Greater Welfare Fund has been struggling to maintain health benefit levels in the face of ever-rising costs. The Greater Pension Fund provides a modest maximum pension of $350 per month. J.A. at 205. This case does not raise issues regarding excess assets in benefit plans.

The Greater Funds retain all the liabilities they had to the employees of the Southern Employers who had been plan participants. In other words, the Greater Funds have paid, and continue to pay, all benefits to which their participants are entitled, including benefits to which employees of the Southern Employers are entitled. J.A. at 309.

B. The Proceedings Below

The Respondents initiated this action against Petitioners in the United States District Court for the Southern District of New York on August 7, 1985. J.A. at 3-4. The Respondents contended that the Greater Funds' failure to transfer a portion of the plan assets to the Southern Funds constituted a "structural defect" in violation of Section 302(c)(5).[2] The Respondents also contended that

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[1] J.A. at 29, 135-36. The employees of the Southern Employers did not accrue benefits in any pension plan between July 1, 1984, and November 30, 1985, because the Southern Pension Fund did not become operational until December 1, 1985. J.A. at 12, 130-31. The Southern Employers continued to contribute to the Greater Welfare Fund until September 30, 1985, and that Fund provided welfare benefits for the Southern employees until December 1, 1985, the date that the Southern Welfare Fund became operational. J.A. at 11-12, 129, 131.

[2] Specifically, the Respondents claimed that:

> [I]n order to comply with Section 302(c)(5) the Greater New York Pension Fund must recognize that its assets are

the trustees of the Greater Funds breached their fiduciary duties under ERISA Section 404(a), 29 U.S.C. § 1104(a), by not transferring a portion of the Greater Funds' assets to the Southern Funds. The Respondents further contended that the Greater Funds violated ERISA Section 4234, 29 U.S.C. § 1414, because the governing plan documents did not contain provisions requiring an asset transfer. Respondents and Petitioners both filed motions for summary judgment on the above claims. Petitioners also filed a motion to dismiss for lack of standing and jurisdiction.

On March 15, 1989, the District Court denied Respondents' summary judgment motion, granted Petitioners' motion for summary judgment on the first two claims, and dismissed the third claim for lack of standing. The District Court concluded that "any transfer here would be for the primary benefit of employers, not the employees" and that in enacting ERISA and Section 302 Congress did not intend to benefit employers. Pet. App. at 20a-21a. Further, the District Court, referring to ERISA, concluded that "[b]ecause Congress has specifically legislated in this area and has decided when a transfer of assets and liabilities is mandated, the Court should not and cannot expansively interpret LMRA Section 302(c)(5) so as to accomplish that result." Pet. App. at 26a. Finally, the District Court held that the

attributable, in corresponding amounts, to the *contributions made by each contributing employer*. Further, *the Greater New York Pension Fund must utilize those assets solely to benefit the employees of each particular contributing employer* . . . . Otherwise, the Greater New York Pension Fund would be employing those assets for the sole and exclusive benefit of individuals other than the employees on whose behalf the contributions were made.

Response (to Interrogatory No. 6) of Respondents/Plaintiffs to Petitioners'/Defendants' First Set of Interrogatories (emphasis added). Respondents made the same assertion regarding the Greater Welfare Fund. J.A. at 305-07.

asset transfer provisions in ERISA Sections 4234 and 4235, 29 U.S.C. §§ 1414 and 1415, were inapplicable because there had been no transfer of liabilities and the employees had not changed their bargaining representative. Pet. App. at 26a-28a.

Respondents appealed to the Court of Appeals for the Second Circuit. On June 12, 1991, the Second Circuit reversed the judgment of the District Court on the first claim, holding that:

> the only way that the Southern Employees could ever receive the "sole and exclusive benefit" of their employers' contributions to the Greater Funds on their behalf would be to mandate a reallocation of reserves from the Greater Funds to the Southern Funds. Absent such a reallocation, the Greater Funds would suffer from a "structural defect."

Pet. App. at 11a. The Second Circuit remanded with instructions to enter partial summary judgment for Respondents and to determine the amount of plan assets to be transferred to the Southern Funds. The Second Circuit found it unnecessary to reach the merits of the remaining two claims.[3]

SUMMARY OF ARGUMENT

The Second Circuit erred in holding that the Labor Management Relations Act, 1947 Section 302(c)(5) governs the transfer of assets of employee benefit plans. In the present case, as in *United Mine Workers v. Robinson*, 455 U.S. 562, 573 (1982), "[t]he Court of Appeals did not attempt to ground its holding on the text or legislative history of § 302(c)(5)." Indeed, the language and legislative history of Section 302(c)(5) demon-

[3] The other two claims of the Respondents were (1) that ERISA Section 4235, 29 U.S.C. § 1415, requires that the Greater Funds adopt new asset transfer rules, and (2) that the Greater Funds' trustees allegedly "had breached their fiduciary duties under § 404 of ERISA." Pet. App. at 4a-5a. The District Court found no merit in these claims. Pet. App. at 26a-28a.

strate that this provision was intended by the Congress to be a narrow exception to a broad criminal prohibition. Section 302(c)(5) was never intended to, and does not, authorize the federal courts to rewrite and regulate employee benefit plans; in particular, it contains no reference to the transfer of plan assets. Moreover, the Second Circuit's decision squarely conflicts with this Court's decision in *Robinson*.

By contrast with Section 302(c)(5), the Employee Retirement Income Security Act of 1974, as amended, is comprehensive legislation regulating employee benefit plans. ERISA expressly deals with the transfer of assets of benefit plans. Not only is a transfer of assets not required by ERISA in this case, but such a transfer would in fact violate ERISA.

ARGUMENT

I. SECTION 302(c)(5) DOES NOT AUTHORIZE FEDERAL COURTS TO ORDER A TRANSFER OF ASSETS FROM ONE MULTIEMPLOYER BENEFIT PLAN TO ANOTHER

A. Congress Limited the Requirements of Section 302(c)(5) to Those Specified in That Section

Section 302(c)(5), 29 U.S.C. § 186(c)(5), should not be read to regulate conduct not expressly prohibited by its terms. Section 302(c)(5) is an exception to a criminal statute which was enacted in 1947 and "was aimed at practices that Congress considered inimical to the integrity of the collective bargaining process." *Arroyo v. United States*, 359 U.S. 419, 425 (1959). Section 302(a), 29 U.S.C. § 186(a), prohibits an employer from making any payment to any employee representative, and Section 302(b), 29 U.S.C. § 186(b), prohibits the receipt of any payment made in violation of Section 302(a). The federal courts are also authorized under Section 302(e), 29 U.S.C. § 186(e), to restrain violations of these criminal prohibitions.

Section 302(c)(5) carves out from the broad prohibition on employer contributions payments to:

> a trust fund established . . . for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families and dependents jointly with the employees of other employers making similar payments, and their families and dependents).

29 U.S.C. § 186(c)(5). In order to avoid criminal penalties, such a trust fund must comply with certain standards set forth with excruciating specificity in Section 302(c)(5). A jointly-administered trust fund must: (1) use employer contributions only for specified types of benefits; (2) use those assets only for benefits for employees and families of the contributing employer and the employees and families of other contributing employers; (3) set forth the detailed basis for the contributions in a written agreement with the employer; (4) hold its assets in trust; (5) provide that employers and employees be equally represented in the administration of the plan; (6) provide for an annual audit; and (7) keep pension and annuities contributions in a separate trust from contributions for other benefits. *Id.* Thus, the language of the statute provides no basis for the conclusion that Congress intended the statute to create a general set of rules governing employee benefit plans. Rather, the words of the statute require strict compliance with its specific requirements, and nothing more.

Moreover, the legislative history of Section 302(c)(5) provides no support for the proposition that Congress intended to confer on the federal courts authority to oversee the administration of employee benefit plans or to review the reasonableness of plan terms. Indeed, the legislative history of that Section makes no mention of a multiemployer plan's statutory duty to transfer plan assets to another multiemployer plan, under the circumstances of the present case—or any other circumstances,

for that matter.[4] Rather, the legislative history confirms that Congress' concern was based on the perception of a "grave danger that the funds [would] be used for the personal gain of union leaders, or for political purposes, or other purposes not contemplated when they [were] established, and that they will in fact become rackets." 93 Cong. Rec. 4805 (1947) (statement of Sen. Ball). The "specific purpose" of Section 302(c)(5) was "to prohibit the labor unions from requiring welfare funds to be paid into the treasuries of the labor unions." 93 Cong. Rec. 4805 (1947) (statement of Sen. Byrd).

The specific provisions of Section 302(c)(5) were designed as a means to prevent these abuses. Congress enacted Section 302 against a backdrop of reported corruption through bribery of employee representatives. Congress feared that union officials might divert funds contributed by employers for welfare purposes to carry out entirely different union objectives. Such a view was reflected by this Court in *Arroyo*, 359 U.S. at 425-26, where the Court emphasized that the purpose of this section was to address union and employer corruption:

> Those members of Congress who supported [§ 302] were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control. Congressional attention was focussed particularly upon the latter problem because of the demands which had then recently been made by a large international union for the establishment of a welfare fund to be fi-

[4] The absence of any mention of an asserted statutory duty has been noted by this Court as significant in the interpretation of a statute. *See Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 548, 551 (1988) ("it [is] highly unlikely that the limited reach of the statute is the consequence of inadvertence rather than deliberate choice").

nanced by employers' contributions and administered exclusively by union officials.

Id.; see also United Mine Workers v. Robinson, 455 U.S. at 570 n.8 (citing *Arroyo*). In view of its status as a part of a criminal statute, Section 302(c)(5) should be strictly construed to insure compliance with the specific safeguards that Congress wrote into it. *See Dowling v. United States*, 473 U.S. 207, 214 (1985); *Sutherland Stat. Const.* § 59.03 (4th Ed.).

Moreover, as this Court concluded in *Arroyo*, "[a]n examination of the legislative history confirms that a literal construction of this statute does no violence to common sense." 359 U.S. at 424. This Court observed that the debates in Congress show "not the slightest indication that § 302 was intended to duplicate state criminal laws." 359 U.S. at 425. Likewise, those debates show "not the slightest indication that § 302 was intended to duplicate state" trust laws. *Id.*

Strong support for the conclusion that Section 302(c)(5) does not establish federal fiduciary standards for trustees of employee benefit plans is provided by the statutory language, an absence of any evidence of such a congressional purpose in the legislative history, and the fact that the provision is a part of a criminal statute. Section 302(c)(5) was not crafted to be the fount from which a broad new federal regulatory code of conduct for plan trustees would flow. Rather, "Congress clearly intended to draw upon established principles of state trust law as a means of regulating employer-employee payments."[5]

In sum, an important purpose for the subsequent enactment of ERISA was to close a perceived gap in the federal regulation of employee benefit plans. "The Labor

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[5] *Bricklayers, Masons & Plasterers Int'l Union of Am. v. Stuart Plastering Co.*, 512 F.2d 1017, 1025 (5th Cir. 1975); *see also Central States v. Central Transport, Inc.*, 472 U.S. 559, 571 n.10 (1985).

Management Relations Act, Section 302, . . . is not intended to establish, nor does it provide standards for . . . fiduciary conduct."[6] Thus, Congress designed the LMRA to provide only very limited rules for the operation of jointly-administered benefit plans.

B. Lower Federal Courts Have Misconstrued Section 302(c)(5) in Asserting Broad Jurisdiction over the Regulation of Employee Benefit Plans

1. *Vacillation Among Lower Courts Concerning the Scope of Section 302(c)(5)*

As perceived abuses arose over the years in jointly-administered plans and in the absence of a federal statute designed to regulate benefit plans, some federal courts yielded to the temptation to stretch the boundaries of Section 302(c)(5) to engraft federal standards for plans. One result has been that federal courts have vacillated between applying the specific requirements in Section 302(c)(5) as written by Congress and asserting that Section as a source of broad judicial authority to regulate employee benefit plans. For example, in *Copra v. Suro*, 236 F.2d 107, 115 (1st Cir. 1956), the First Circuit, in dicta, said that Section 302's "legislative history suggests . . . that Congress intended in § 302(e) to create a broad equity jurisdiction that would authorize the district courts . . . to exercise a more general equity power over the welfare funds whose life in effect depends on the permissive exception of § 302(c)(5)." Thereafter, the First Circuit recanted that erroneous interpretation in *Bowers v. Ulpiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968). In *Bowers*, the Court held that LMRA "limits federal courts to 'restrain violations' . . . of basic structure, as determined by the Congress, not violations of fiduciary obligations or standards of prudence in the administration of

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[6] S. Rep. No. 127, 93d Cong., 1st Sess. 4 (1973); *see also* H. Rep. No. 533, 93d Cong., 1st Sess. 4 (1973). *See infra* pp. 20-21.

the trust fund." 393 F.2d at 424. Significantly, the structural violations that the First Circuit found to be within the federal courts' authority involved the failure to meet the *specific* requirements of Section 302(c)(5). *Bowers*, 393 F.2d at 424 n.4.

The Second Circuit has similarly vacillated in its handling of Section 302(c)(5) cases. For example, in *Riley v. MEBA Pension Trust*, 570 F.2d 406, 412 (2d Cir. 1977), the Second Circuit acknowledged that it did not have "enthusiasm for the notion that § 302(c)(5) gave the federal courts a roving jurisdiction over even the structure of pension plans." Yet in *Valle v. Joint Plumbing Indus. Bd.*, 623 F.2d 196 (2d Cir. 1980), the same court held that it had jurisdiction where the plaintiff alleged that a particular trust provision was arbitrary or unreasonable; such allegations "sufficiently allege a 'structural defect' to support federal juridiction."[7] In *Local 50, Bakery & Confectionery Workers Union v. Local 3, Bakery & Confectionery Workers Union*, 733 F.2d 229 (2d Cir. 1984), the Second Circuit held that Section 302(c)(5) required a transfer of assets from one multiemployer benefit plan to another.[8]

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[7] *Valle*, 623 F.2d at 203 n.15. The Third Circuit has also vacillated in its treatment of these cases. *Compare Moyer v. Kirkpatrick*, 387 F.2d 955 (3d Cir. 1968), *aff'g* 265 F. Supp. 348 (E.D. Pa. 1967) (court refused to examine a change in eligibility requirements because it ruled there was no legal basis for interference) *with Knauss v. Gorman*, 583 F.2d 82 (3d Cir. 1978) (court determined it had jurisdiction to examine eligibility rule which was arbitrary and capricious because the rule constitutes a structural defect).

[8] The Second Circuit's (and other Circuits') expansive interpretation of Section 302(c)(5) (especially since the decision in *Local 50*) is encouraging litigation. The progeny includes *Sheet Metal Workers' Local 28 v. Gallagher*, 960 F.2d 1196 (3d Cir. 1992); *Trapani v. Consolidated Edison Employees' Mut. Aid Soc'y, Inc.*, 891 F.2d 48 (2d Cir. 1989); *Caterino v. Barry*, 761 F. Supp. 897 (D. Mass.), *appeal docketed*, No. 91-1542 (1st Cir. June 12, 1991) (argued April 8, 1992); *Plasterers Local 202 v. Plasterers Local*

2. *The Early Section 302(c)(5) Cases*

Some of the confusion in applying Section 302(c)(5) is traceable to the early cases arising in the federal courts in the District of Columbia ("District"). Prior to the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970) ("Court Reform Act"), the federal courts in the District had jurisdiction over local matters in addition to the normal judicial responsibilities of other federal courts.[9] Accordingly, when an employee benefit plan trust was before a federal court in the District, the court could, and did, apply the general equity powers of courts over the operation of trusts. In those cases, the District's federal courts applied the arbitrary and capricious standard of review to employee benefit plan trusts, just as those courts applied that standard to other trusts (i.e., non-benefit trusts).[10] In a number of cases involving employee benefit plans, the courts did not even cite Section 302(c)(5).[11] In other cases, the courts cited Section 302(c)(5), but only as the reason the benefit plan was in trust form,

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60, 710 F. Supp. 42 (E.D.N.Y.), *appeal dismissed without opinion*, 888 F.2d 1376 (2d Cir. 1989).

The *Trapani* case is of special interest because the benefit plan involved was a single employer benefit plan, demonstrating that the vulnerability of benefit plans to judicial rewriting of plan terms is not limited to multiemployer plans. Although the *Trapani* Court cited ERISA as authority, it did not cite any ERISA legislative history or any ERISA caselaw. The only cases discussed and relied upon by the *Trapani* Court were Section 302(c)(5) cases.

[9] D.C. Code Ann. § 11-521 (1967); *see also Palmore v. United States*, 411 U.S. 389, 392 n.2 (1973) (prior to passage of Court Reform Act, the United States District Court "was filling the role of both a local and federal court").

[10] *See infra* notes 11 & 13.

[11] *See, e.g., Gaydosh v. Lewis*, 410 F.2d 262 (D.C. Cir. 1969); *Sturgill v. Lewis*, 372 F.2d 400 (D.C. Cir. 1966); *Danti v. Lewis*, 312 F.2d 345 (D.C. Cir. 1962).

not as the source of the applicable trust law.[12] Even after the federal courts in the District no longer had "local" jurisdiction following the passage of the Court Reform Act, they continued to handle Section 302(c)(5) cases in the same manner as they had before, applying traditional principles under local trust law.[13]

A review of Section 302(c)(5) cases attests that federal courts in other circuits often adopted the trust law analysis from the District cases. They did so without noting the unusual role of federal courts in the District in exercising local jurisdiction prior to the Court Reform Act.[14] Non-District cases which are based on analyses from District cases are themselves cited in support of the proposition that federal courts can examine the activities of Section 302(c)(5) plan trustees on an arbitrary and capricious basis.[15]

Eventually, many federal courts justified broad jurisdiction over the regulation of employee benefit plans under a "structural defect" analysis. This analysis seems to have

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[12] *See, e.g., Roark v. Lewis*, 401 F.2d 425 (D.C. Cir. 1968); *Miniard v. Lewis*, 387 F.2d 864 (D.C. Cir. 1967), *cert. denied*, 393 U.S. 873 (1968); *Kosty v. Lewis*, 319 F.2d 744 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 964 (1964).

[13] *See, e.g., Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079 (D.C. Cir. 1986); *Pete v. United Mine Workers*, 517 F.2d 1275 (D.C. Cir. 1975); *Lowenstern v. International Ass'n of Machinists & Aerospace Workers*, 479 F.2d 1211 (D.C. Cir. 1973); *Assalone v. Carey*, 473 F.2d 199 (D.C. Cir. 1972).

[14] *Lee v. Nesbitt*, 453 F.2d 1309 (9th Cir. 1971); *see also Seafarers Pension Plan v. Sturgis*, 630 F.2d 218 (4th Cir. 1980); *Gomez v. Lewis*, 414 F.2d 1312 (3d Cir. 1969); *Lugo v. Employees Retirement Fund of Illumination Prods. Indus.*, 529 F.2d 251 (2d Cir. 1973), *aff'g* 366 F. Supp. 99 (E.D.N.Y.), *cert. denied*, 429 U.S. 826 (1976); *Insley v. Joyce*, 330 F. Supp. 1228 (N.D. Ill. 1971).

[15] *See, e.g., Sellers v. O'Connell*, 701 F.2d 575 (6th Cir. 1983); *Reiherzer v. Shannon*, 581 F.2d 1266 (7th Cir. 1978); *Johnson v. Botica*, 537 F.2d 930 (7th Cir. 1976).

been derived from combining the type of traditional trust analysis used by the District's federal courts under their authority to apply local law with the analysis used by the First Circuit in *Bowers*. The irony is that the First Circuit in *Bowers* narrowly construed structural violations to be the specific requirements stated in Section 302 (c)(5).[16] The Second Circuit has cited *Bowers* with approval, and professed to adopt this "narrow view" of the scope of Section 302. *Lugo*, 529 F.2d 251. Nevertheless, the Second Circuit asserted that under the "structural defect" analysis, a plan's procedural provisions may be so arbitrary and capricious that they could violate the "sole and exclusive benefit" provision of Section 302(c)(5). *Lugo*, 529 F.2d at 255-56.[17] Other federal courts have similarly interpreted the "sole and exclusive benefit requirement as requiring reasonable plan terms and procedures.[18]

Thus, instead of construing the words of the statute when noncompliance with Section 302(c)(5) is alleged,

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[16] *See supra* pp. 11-12.

[17] Although the *Lugo* court did not cite to any cases for this holding, it affirmed the lower court ruling on this matter and that ruling was primarily based on District or other derivative cases. *See Lugo*, 366 F. Supp. 99.

[18] *See, e.g., Sellers*, 701 F.2d 575; *Knauss*, 583 F.2d 82; *Reiherzer*, 581 F.2d 1266; *Johnson*, 537 F.2d 930; *Lee*, 453 F.2d 1309.

Other Section 302(c)(5) cases contain reasoning that is equally problematic. For example, in *Nedd v. United Mine Workers of Am.*, 556 F.2d 190 (3d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978), the Third Circuit held that Section 302(c)(5) established a federal common law cause of action for breach of fiduciary duties. *Nedd*, 556 F.2d at 203. According to the Third Circuit," [t]he very enactment of § 302(c)(5) shows that Congress was not satisfied to leave protection of these bargained-for benefits entirely to the state law of trusts." *Id.* at 205. Not surprisingly, the *Nedd* court cites no support for these propositions. *Cf. infra* pp. 20-21.

those courts muse as to whether there is a "structural defect" in the plan. This becomes a search akin to the explorers search for the fountain of youth.

3. *Differences Among Courts of Appeals in Interpreting Section 302(c)(5)*

The term "structural defect" defies definition and legal analysis. As recently as April, 1992, the Third Circuit examined "the extant jurisprudence of structural defect" and found it to be "still somewhat elusive." *Gallagher*, 960 F.2d at 1209. That Court noted that "recognizing structural defects in specific cases has proven difficult, and courts in this circuit and elsewhere have engaged in a tedious case-by-case analysis, producing what sometimes appear to be conflicting results." *Id.* at 1210.

In additon to conflicting results, conflicting reasoning is evident when the Second Circuit's decision in this case is compared with *Gallagher*, *Stinson v. Ironworkers Dist. Council*, 869 F.2d 1014 (7th Cir. 1989), and *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1942 (1992). In *Gallagher*, the Third Circuit held "that employees have no right to carry funds attributable to them with them when they depart a fund for reasons unrelated to the exercise of collective bargaining rights." *Gallagher*, 960 F.2d at 1215. In contrast, the Second Circuit here ordered a transfer of assets even though the departures from the Petitioner Funds were "for reasons unrelated to the exercise of collective bargaining rights." In fact, Local 144 continues to represent the participants in the Southern Funds as well as the participants in the Greater Funds.

In *Stinson*, a case addressing issues similar to those involved here, the Seventh Circuit found no structural

defect where a multiemployer plan contained a provision prohibiting a proportional allocation of the plan's reserves upon withdrawal from the plan. The Seventh Circuit held that "Section 302(c)(5) 'does not require that an employee, employer, group of employers, or union be given a proportionate share of a trust fund's assets simply because a decision is reached to cease participation in the trust.'" *Stinson*, 869 F.2d at 1018 (quoting with approval from the district court's opinion). In *Phillips*, the Ninth Circuit found that there was no structural defect in a multiemployer plan, even though the plan's rules excluded over 97% of the plan's former participants from receiving any benefits.[19] *Phillips*, 944 F.2d at 519.

It is not surprising that the jurisprudence that has evolved is confusing and conflicting since the statutory language of Section 302(c)(5) provides no policy guidance for the "structural defect" theory. The absence of such guidance is understandable because the legislative history shows that the "structural defect" theory was not within Congress' intended scope of that legislation. Further, this Court has repeatedly emphasized the limited scope of that section. *See Arroyo*, 359 U.S. at 425-26; *NLRB v. Amax Coal Co.*, 453 U.S. 322, 331 (1981);

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[19] Incredibly, the *Phillips* Court asserted in dicta that even if a pension benefit plan complies with ERISA's minimum vesting period, the federal courts have the power to rewrite the terms of a benefit plan to require the plan to adopt a "shorter period." 944 F.2d at 514. More astounding is the Court's assertion that such power exists under "both ERISA and the LMRA." *Id. Cf. infra* note 20.

Similarly, in *Mahoney v. Board of Trustees*, 1992 WL 197471 (1st Cir. Aug. 18, 1992), the First Circuit has asserted that the "setting of pension benefit levels" by trustees of a plan is subject to federal court review, under both LMRA and ERISA, as to whether the benefit levels are arbitrary or capricious. However, the establishment or amendment of a plan's design (i.e. terms) is a settlor function, not a fiduciary function, and therefore should not be reviewable under fiduciary standards. *See infra* authorities at note 54.

Robinson, 455 U.S. at 570-75. As a result, the federal courts simply do not have the power, by reason of Section 302(c)(5), to restructure [20] and regulate employee benefit plans.

C. The Decision Below Is Inconsistent with Decisions of This Court Under Section 302(c)(5)

This Court has not construed Section 302(c)(5) to authorize federal courts to regulate transfers of assets among multiemployer benefit plans.[21] To the contrary, this Court has interpreted and applied Section 302(c)(5) in accord with the words of the statute and its status as an exception to a criminal prohibition. This approach is reflected by the Court in *Arroyo*, where the Court noted "*specific* standards were established" to assure that plan expenditures would be made only for approved purposes. *Arroyo*, 359 U.S. at 426 (emphasis added).

Twenty-three years later, this Court held that the reasonableness of collectively bargained plan provisions were not open to scrutiny under Section 302(c)(5). *Robinson*, 455 U.S. at 570-71. According to the *Robinson* Court, the plain meaning of Section 302(c)(5) "is

[20] There is no evidence in the statutory language or legislative history of either Section 302(c)(5) of LMRA or of ERISA that Congress intended to authorize the federal courts to modify or reform the terms of a plan. Even under traditional trust law, courts generally did not, and do not, have the power to change the terms of a trust. Restatement (Second) of Trusts, Ch. 10 (Termination and Modification of the Trust); G. G. Bogert & G. T. Bogert, *The Law of Trusts & Trustees* § 561 (Court Control-Alteration of Powers-Deviation) and § 994 (Power of Court to Modify Trust) (rev. 2d ed. 1980).

[21] This Court explicitly left open whether federal courts are authorized by Section 302(c)(5) to enforce fiduciary duties on plan trustees. *Robinson*, 455 U.S. at 573 n.12. The Ninth Circuit Court of Appeals recently acknowledged that this Court "has yet to address the issue directly" as to whether federal courts have power under Section 302(c)(5) to restructure or rewrite the terms of benefit plans. *Phillips*, 944 F.2d at 513.

simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others. Indeed, this has been this Court's consistent interpretation of § 302(c)(5)." *Id.* at 570.

There is no equivocation or tentativeness in this Court's discussion of this issue. It is clear from *Robinson* that the federal courts have no authority to entertain Respondents' claims because a collectively bargained term of an employee benefit plan is not subject to federal court review for reasonableness under Section 302 of LMRA.

The facts that were determinative in *Robinson* are also present in the instant case. The collective bargaining agreements here (to which Respondent Employers were parties) are clear that the terms of the trust agreements are incorporated by reference.[22] The trust agreements incorporated into those collective bargaining agreements explicitly prohibit the forced payments Respondents seek.[23]

[22] The collective bargaining agreement provides:

> "The parties understand that the New York City Nursing House-Local 144 Welfare Fund will be held and managed under the terms and provisions of an Agreement and Declaration of Trust executed in connection with the said Fund."

J.A. at 218. The agreement also provides:

> The payments so made by the Employer shall be used by New York City Nursing Home-Local 144 Welfare Fund solely for those fringe benefits set forth in the Trust Agreement heretofore executed and thereafter amended establishing such New York City Nursing-Local 144 Welfare Fund.

J.A. at 218. The agreement provides virtually identical language regarding the Greater Pension Fund. J.A. at 220-21.

[23] The trust agreement provides:

> "The assets of the Fund and of the Plan shall at no time inure to the benefit of any Employer."
>
> * * *
>
> No employer or employee, or any person claiming by or through such employee by reason of having been named a beneficiary, in a certificate or otherwise, shall have any rights,

In *Central Tool Co. v. International Ass'n of Machinists Nat'l Pension Fund*, 811 F.2d 651 (D.C. Cir. 1987), as in the present case, the collective bargaining agreement incorporated by reference the plan's trust agreement. The D.C. Circuit held that the provision in the trust agreement "falls within the ambit of *Robinson* and outside our proper authority to review." *Central Tool*, 811 F.2d at 664. Thus, Petitioners' refusal to disburse plan assets as sought by Respondents falls squarely within the *Robinson* category of decisions compelled by collective bargaining agreement. Under the trust agreements, the trustees have no option regarding Respondents' demands. In the present case, the collective bargaining agreement incorporated by reference the trust agreement which prohibits the transfer of assets sought by Respondents. Accordingly, the asset transfer prohibition in the trust agreement "falls within the ambit of *Robinson* and outside [the federal courts'] authority to review." *Central Tool*, 811 F.2d at 664.

D. In ERISA, Congress Created a Comprehensive Body of Federal Law Applicable to Employee Benefit Plans

Congress struggled with the complexities of employee benefit plans for more than seven years before enacting ERISA in 1974, the first comprehensive federal legislation regulating private employee benefit plans. As this Court noted in *Nachman v. PBGC*, 446 U.S. 359, 361-62 (1980), ERISA is a "comprehensive and reticulated" statutory framework for the regulation of employee ben-

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> title or interest in or to the funds or other property of the Trust Fund or any part thereof, except that employees shall have the right to such benefits as may specifically be provided by the Plan.

The trust agreements of both Petitioner Pension Fund and Welfare Fund contain this language. J.A. at 161-62; *see also* J.A. at 185-86.

efit plans.[24] Unlike LMRA, ERISA was specifically intended to provide strict fiduciary standards for employee benefit plans.[25] Congress recognized that the LMRA had not created such standards:

> The Labor-Management Relations Act, Sec. 302, provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union. The Act is not intended to establish, nor does it provide standards for . . . fiduciary conduct.[26]

With the enactment of ERISA, Congress federalized fiduciary law relating to employee benefit plans[27] and directed that the federal courts have exclusive jurisdiction to enforce those fiduciary rules. In *Amax Coal Co.*, this Court noted that ERISA had occupied the

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[24] *Accord Ingersoll-Rand v. McClendon*, 111 S. Ct. 478, 482 (1990) ("ERISA is a comprehensive statute"); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985) (ERISA "comprehensively regulates employee pension and welfare plans"); *Robinson*, 455 U.S. at 575 ("detailed and comprehensive standards of the ERISA"); *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551, 569 (1979) ("ERISA deals . . . in detail with pension plans" and is "comprehensive legislation").

[25] Congress explicitly declared that a primary policy of ERISA was "to protect . . . the interests of participants in employee benefit plans and their beneficiaries, by . . . establishing standards of conduct, responsibility, and obligations for fiduciaries of employee benefit plans . . . ." Section 2(b), 29 U.S.C. § 1001(b).

[26] S. Rep. No. 127, 93d Cong., 1st Sess. 4 (1973); *see also* H. Rep. No. 533, 93d Cong., 1st Sess. 4 (1973).

[27] Congress intended that a federal common law under ERISA would be fashioned by the federal judiciary. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)) ("[C]ourts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'"); *see also Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983) ("ERISA's legislative history indicates that . . . 'a body of federal substantive law will be developed by the courts. . . .'").

field, stating that ERISA "essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet." [28] 453 U.S. at 323.

Pertinent here is this Court's reasoning in *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979). In *Daniel*, this Court held that the "existence of this comprehensive legislation [ERISA] governing the use and terms of employee pension plans severely undercuts all arguments for extending" the federal securities laws to pension plans. *Daniel*, 439 U.S. at 569-70. This Court noted that:

> ERISA requires pension plans to disclose specified information to employees in a specified manner, *see* 29 U.S.C. §§ 1021-1030, in contrast to the indefinite and uncertain disclosure obligations imposed by the antifraud provisions of the Securities Acts . . . .

Id. at 569. The reasoning of this Court in *Daniel* applies here with equal force.[29] The generalized language in Section 302(c)(5) is in stark contrast to ERISA's comprehensive, detailed treatment of the very question involved here.

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[28] A "Section 302(c)(5) trustee," like other trustees, would have been subject to the well-developed body of state trust law. This Court did not say that the "strict fiduciary standards that a Section 302(c)(5) trustee must meet" emanated from Section 302(c)(5). It is clear from the fiduciary provisions in ERISA that Congress borrowed heavily from state trust law experience in formulating ERISA's rules. H. Rep. No. 533, 93d Cong., 1st Sess. 11 (1973). Moreover, Congress intended that the evolving federal fiduciary common law under ERISA would borrow heavily from state trust law experience.

[29] *See Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228-29 (1957) ("[s]pecific terms prevail over the general"); *see also Busic v. United States*, 446 U.S. 398, 406 (1980); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974).

II. SECTION 302(c)(5) DOES NOT RESTRICT THE USE OF A PARTICULAR EMPLOYER'S CONTRIBUTIONS TO THE PAYMENT OF BENEFITS FOR ONLY THAT EMPLOYER'S EMPLOYEES

A. The Specific Language of Section 302 Permits Funds to Pool All Contributions for Benefits for All Participants

The language of Section 302(c)(5) explicitly allows contributions of any contributing employer to a multiemployer benefit plan to be used for benefits of plan participants who are not employees of the particular contributing employer. Section 302(c)(5) specifically provides that contributions made by an employer are to be "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents *jointly with the employees of other employers making similar payments*, and their families and dependents)." 29 U.S.C. § 186(c)(5) (emphasis added). The meaning of this text is plain—contributions by any employer in a multiemployer plan may be applied to pay benefits to employees of other contributing employers, as well as to the employees of the particular contributing employer.[30]

Recently, the Ninth Circuit Court of Appeals had occasion to note:

> In any such pooled fund, depending on the empirically contingent pattern of employee health and sickness, one employer's employees may never need to file a claim and this employer's payments may be used wholly to pay for claims made by a different employer's employees. Because any multiemployer trust

[30] It is noteworthy that key cases in the jurisprudence regarding "structural defect" inexplicably fail to include the emphasized language when they quote the exclusive benefit provisions of Section 302(c)(5), thereby shifting the focus of attention in a misleading fashion to the employees of a single employer. *See, e.g., Gallagher*, 960 F.2d at 1209; *Local 50*, 733 F.2d at 232, 234.

> fund might result in one employer's payments covering the claims of another employer's employees, the Employers' argument leads inexorably to the conclusion that all multiemployer trust funds violate the "sole and exclusive benefit" rule of subsection 302(c)(5). This conclusion, directly contradicting subsection 302(c)(5)'s explicit authorization of multiemployer trust funds, is untenable.

British Motor Car Distribs., Ltd. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989); *see also Stinson*, 869 F.2d 1014.

Further, this Court has flatly stated that there is not "any restriction on the allocations of the funds among the persons protected by § 302(c)(5)." *Robinson*, 455 U.S. at 572. In *Robinson*, this Court declared that the "plain meaning" of Section 302(c)(5) "is simply that employer contributions to employee benefit trust funds must accrue to the benefit of employees and their families and dependents, to the exclusion of all others. Indeed, this has been this Court's consistent interpretation of § 302(c)(5)."[31] *Id.* at 570.

B. A Rule Requiring Segregation of Plan Assets by Contributing Employers Would Undermine the Underlying Principles of the Multiemployer Plan System

Multiemployer plans have traditionally pooled contributions. Congress understood and acknowledged that practice at the time it enacted Section 302(c)(5), and there is no evidence that Congress intended to change the prac-

[31] In *Walsh v. Schlecht*, 429 U.S. 401 (1977), this Court held that Section 302(c)(5) was not violated where, pursuant to a collective bargaining agreement, a general contractor paid contributions to multiemployer benefit plans measured by the hours of work performed by a subcontractor's employees (as well as his own employees) even though no employee of the subcontractor was entitled to benefits in the benefit plans.

tice. In the Senate debate preceding adoption of the language which became Section 302(c)(5), there are repeated references to then-existing funds which covered the employees of many employers.[32] The proponents of Section 302(c)(5) asserted that such funds could continue to operate with relatively minor changes, such as joint employer-union administration. As Senator Taft stated:

> The purpose is to prevent the abuse of welfare funds. . . . The amendment would not substantially affect any of those funds, except that with respect to some of them the appointment of an employer representative might be required, in order that there might be joint administration instead of single administration.

93 Cong. Rec. 4877 (1947) (statement of Sen. Taft).

Uncontroverted expert testimony in the record herein establishes the fact that a requirement forcing these plans to segregate funds by each particular contributing employer would undermine the viability of these plans. According to Professor Dan M. McGill of the Wharton School of Finance, University of Pennsylvania, the foremost American academic scholar on employee benefit plans, in the typical multiemployer plan,

> [t]he contributions of all employers are available to the trustees of the plan to pay benefits for all eligible employees. . . . [A]n employer shares the costs of the entire plan with all other participating employers. . . . [O]ne of the efficiencies of multiemployer plans is that they do not attempt to track costs so that they may be assigned to a particular employer. The same principle applies for individual employees. . . . The cost of the employee's welfare and pension benefits

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[32] *See, e.g.*, 93 Cong. Rec. 4881-82 (1947) (statement of Sen. Morse) (International Ladies Garment Workers Union vacation fund); 93 Cong. Rec. 4805 (1947) (statement of Sen. Byrd) (United Mine Workers welfare fund); and 93 Cong. Rec. 4876 (1947) (statement of Sen. Taft) (United Mine Workers welfare fund).

> could fall anywhere in a wide range, depending on age, health or other variables.[33]

Professor McGill cautions that:

> Diversion of multiemployer pension plan assets to . . . follow the employer and his employees when they leave the multiemployer plan . . . would be inconsistent with the basic concepts of mutiemployer plans. . . . In short, multiemployer plans are cost-sharing devices, and to the extent that cost-sharing is nullified by forced transfers, they will lose their viability.[34]

The pooling of resources to provide against a common risk is a well-established insurance principle and is at the heart of multiemployer pension and welfare benefit plans. A multiemployer plan allows the opportunity to spread the risk over a larger group and to benefit from economies of scale in administration. According to A. H. Higgs, Jr., Vice President of the Martin E. Segal Company, a firm serving about half of all multiemployer plan participants in the United States:

> The contribution rate for a multiemployer plan is . . . determined on a uniform basis plan-wide . . . without regard to their employer or his employees' characteristics. . . . If the contributions of a particular employer in excess of the value of health benefits provided to the employer's employees were required to be paid out of the multiemployer plan to the benefit of that employer when the employer left the plan, only employers with a positive balance would likely choose to leave the plan and take assets from it. Employers with a negative balance would stay put, continuing to incur costs greater than their contributions. This is a classic case of the impermissible practice known to insurers as adverse selection.[35]

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[33] McGill Affidavit, J.A. at 251-52.

[34] *Id.*, J.A. at 252-53.

[35] Higgs Affidavit, J.A. at 231.

By participating in a multiemployer plan the employer strikes a clear bargain: for the length of its collective bargaining commitment the employer is contractually obligated to pay the contributions stated, and in return, the plan is responsible for providing benefits to employees of the employer in accordance with the plan's provisions.[36] Most multiemployer plans standardize benefit costs for competing employers without regard to the actual cost characteristics of any single employer's work force. They stabilize actuarial and investment experience, afford the economies of large scale operations, and have the ability to provide a continuity of coverage for employees moving among different employers within the plan.[37]

Without cost-sharing, chaos would result for the thousands of multiemployer plans providing benefits for over nine million participants (and millions more of their families).[38] Many multiemployer plans include hundreds even thousands of employers and often employees obtain credits under the plan while working for a number of different employers. Typically, multiemployer plans do not keep records of benefits on an employer basis.[39] Individual accounting would be so inordinately expensive that as a practical matter, many multiemployer plans could not exist if they were forced to undertake it.[40]

More important, exposure to claims from any employer or employee who could claim an excess of contributions over costs would destroy the principle on which multiemployer plans are built. It would call into question decades of experience and create a powerful incentive for

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[36] McGill Affidavit, J.A. at 251.

[37] *Id.*, J.A. at 251-53; Higgs Affidavit, J.A. at 231-32, 234-35.

[38] Higgs Affidavit, J.A. at 228.

[39] McGill Affidavit, J.A. at 252.

[40] *Id.*

litigation[41] by employers who think they have paid (on an experience-rated basis) more in contributions than the value of benefits provided to their employees.[42] In substance, that is what Respondents seek in the present case. Multiemployer plans need not, nor should they be required to, segregate each employer's contribution for the benefit of that employer's workers.

III. ERISA SPECIFICALLY PROHIBITS THE TRANSFER OF ASSETS FROM ONE MULTIEMPLOYER PLAN TO ANOTHER UNDER THE FACTS IN THIS CASE

By requiring the Greater Funds to transfer a significant portion of its assets to the newly-established Southern Funds, the Second Circuit is requiring conduct that violates ERISA and/or its policies. Whereas Title IV of ERISA, 29 U.S.C. §§ 1301-1461, prohibits a transfer of assets without a transfer of corresponding liabilities, the Second Circuit is requiring such a transfer. Whereas Title IV of ERISA requires a withdrawing employer to pay a multiemployer pension plan withdrawal liability,[43] the Second Circuit is requiring the petitioner plans to pay money to withdrawing employers. Whereas Title I of ERISA, 29 U.S.C. §§ 1001-1168, bars the use of plan assets to benefit employers, the Second Circuit is mandating that plan assets be so used. Whereas Title I requires plan fiduciaries to administer the plan in accordance with the plan's governing documents, the Second Circuit is requiring Petitioner plans to pay out money in violation of the plan's governing documents. Accordingly, the Sec-

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[41] *See supra* note 8.

[42] *Caterino*, 761 F. Supp. 897.

[43] Under Title IV, an employer whose obligation to contribute to a multiemployer plan ceases ("withdraws") is liable to pay the plan a share of certain unfunded benefits ("withdrawal liability"). Section 4201, 29 U.S.C. § 1381.

ond Circuit's holding would require conduct that is in clear violation of ERISA.

A. ERISA Bars Multiemployer Plan Transfers Unless Certain Statutory Requirements Are Met

The transfer of assets sought in this case is impermissible because of noncompliance with ERISA's requirements pertaining to transfer of assets and liabilities. With the enactment of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208 (1980), Congress amended ERISA specifically to address issues relating to multiemployer plans that had not been adequately resolved when ERISA was enacted in 1974. The language of MPPAA is unambiguous—it prohibits transfers of assets between multiemployer pension plans unless specific requirements are satisfied. Section 4231, 29 U.S.C. § 1411.

MPPAA provides that "a plan sponsor may not cause a multiemployer plan to . . . engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such . . . transfer satisfies the requirements of subsection (b) of this section." ERISA § 4231(a), 29 U.S.C. § 1411(a). Subsection (b) requires, among other things, that, before any such transfer, notice must be provided to the Pension Benefit Guaranty Corporation ("PBGC") so that it can determine whether the transfer satisfies other statutory requirements. ERISA § 4231(b)(1), 29 U.S.C. § 1411(b)(1). Any such transfer must also comply with specified substantive restrictions in Sections 4231(b)(2)-(4), 29 U.S.C. §§ 1411(b)(2)-(4). Where, as here, none of these requirements has been satisfied, the Greater Funds cannot legally transfer their assets to the Southern Funds.

B. ERISA Does Not Permit the Transfer of Assets Without a Transfer of Corresponding Liabilities

Under MPPAA, any transfer of assets is required to be accompanied by a transfer of liabilities. This is true whether the transfer is permissive (i.e., at the volition

of the transferor plan) or mandatory (i.e., when there is a certified change of collective bargaining representative). ERISA §§ 4231, 4234 and 4235, 29 U.S.C. §§ 1411, 1414, and 1415.

In this case, the district court made a specific finding that "there has been no transfer of liabilities from the Greater Funds to the Southern Funds," Pet. App. at 24a, and the Second Circuit could not, and did not, modify this finding.[44] As the District Court correctly noted, "an assumption of liability for welfare benefits and past service credit by the Southern Funds is not the same as a transfer of liabilities from the Greater Funds to them, since the latter implies that the Greater Funds had a pre-existing obligation to those who left the plan, which is simply not the case here." Pet. App. at 24a.

Absent a transfer of liabilities, a transfer of assets from the Greater Pension Fund would be inconsistent with MPPAA and therefore could not be made legally.[45] As the District Court noted in its opinion, "there is no indication in the statute or its legislative history demonstrating that Congress intended to require a transfer of assets in any other situation unless there was a voluntary

[44] According to regulations promulgated by PBGC and the IRS, a transfer of liabilities requires the diminution of liabilities of the transferor plan and the assumption of those liabilities by the transferee plan. 29 C.F.R. § 2670.3 (1991); 26 C.F.R. § 1.414(l)-1(b)(3) (1991).

[45] In fact, not only does the congressional scheme mandate that no plan assets be transferred without a corresponding transfer of liabilities, but also, there are specified circumstances when "a transfer of assets from the old plan to the new plan is prohibited" —and even though an asset transfer is prohibited, "the old plan shall transfer" certain liabilities to the "new plan." ERISA §§ 4235(e)(1) and (2), 29 U.S.C. §§ 1415(e)(1) and (2). Thus, although congressional policy requires a transfer of assets only when accompanied by a transfer of liabilities, in certain circumstances it requires the transfer of liabilities even in the absence of a transfer of assets.

transfer of liabilities, which is clearly not the case here."[46]

Section 4235, 29 U.S.C. § 1415, is the only provision in ERISA that *requires* a transfer of assets and liabilities. Such a transfer is mandated only when there is a certified change in the employees' collective bargaining representative. Under this provision, a multiemployer plan must transfer assets as well as corresponding liabilities when an employer withdraws from the plan as a result of the decertification of a collective bargaining representative. Where, as here, there has been no change in the collective bargaining representative, since Local 144 continues to represent the employees of the Southern Employers, no transfer of assets and liabilities is required.[47]

C. ERISA Bars Plans from Transferring Assets for the Benefit of Employers

ERISA Section 403(c)(1), 29 U.S.C. § 1103(c)(1), provides that "the assets of a plan shall never inure to the benefit of any employer."[48] *Amax Coal Co.*, 453 U.S. at 333. Moreover, this Court has noted that Section 406 of ERISA, 29 U.S.C. § 1106, "requires that a

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[46] Pet. App. at 28a.

[47] Absent decertification, no provisions in MPPAA require multiemployer plans to transfer assets. Section 4234, 29 U.S.C. § 1414, which Respondents have used to support their demand, in no way mandates a transfer of assets. It requires that a multiemployer plan adopt asset-transfer rules which do not unreasonably restrict the transfer of plan assets when there is a voluntary transfer of plan liabilities, and that such rules be uniform in their application. If the plan chooses not to transfer liabilities, which it is entitled to do absent decertification, the requirements in Section 4234 are simply not applicable, as in the present case.

[48] The mandate of ERISA Section 403(c)(1) has been held to bar contributing employers from obtaining the benefit of a surplus of assets upon termination of a multiemployer plan. *British Motor Car Distribs.*, 882 F.2d 371.

benefit plan prevent participant employers from gaining *even temporary use* of assets to which the plan is entitled." *Central Transport*, 472 U.S. at 573 (emphasis added). Furthermore, "§ 406(a)(1)(E) prohibits any transaction between the trust and a 'party in interest,' including an employer." *Amax Coal Co.*, 453 U.S. at 333.

A transfer of assets from the Greater Funds to the Southern Funds would constitute a transfer of assets for the benefit of the Southern Employers, thus violating ERISA Section 403(c)(1) and the Internal Revenue Code.[49] The District Court specifically found that the transfer of assets sought here would be for the benefit of the Southern Employers. Pet. App. at 20a-21a. The Southern Employers had a contractual obligation to fund the Southern Plans and thus any money paid into the Southern Funds by the Greater Funds would inure to the benefit of the Southern Employers. That concept is underscored by the fact that it is the withdrawing employers themselves, and not the new Southern Plans, that initiated this present action. Indeed, those employers conceded that their purpose in bringing this action was to diminish their obligation to contribute to the new plans.[50] Accordingly, if the Greater Funds were to pay money to the Southern Funds, that would be the payment of money to the benefit of the Southern Employers under ERISA. Such a transfer to the Southern Plans would constitute "income" to the Southern Employers under the Internal Revenue Code.[51]

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[49] Internal Revenue Code Section 401(a)(2), 26 U.S.C. § 401(a)(2), bars the use of plan assets for any purpose "other than for the exclusive benefit" of employees or their beneficiaries.

[50] Grossman Dep., J.A. at 332-33; Demisay Dep., J.A. at 341-42.

[51] The Internal Revenue Service ("IRS") has issued a ruling regarding a proposed transfer of assets from one multiemployer plan to another, which supports the proposition that the transfer sought here should be viewed as a transfer for the benefit of the Southern Employers. The IRS ruled that the "assets from Plan X,

ERISA Section 403 highlights the fact that Congress considered the circumstances under which an employer may be entitled to the return of a part of its contributions to an employee benefit plan. After careful consideration, Congress chose to limit severely those circumstances to situations where the contribution to a multiemployer plan was made by "a mistake of fact or law." ERISA § 403 (c)(2)(A)(ii), 29 U.S.C. § 1103(c)(2)(A)(ii).[52] There is no contention in this case that there was any entitlement to the return of contributions pursuant to those provisions of ERISA, and indeed, there is no such entitlement.

D. ERISA's Strict Fiduciary Requirements Prohibit the Trustees from Transferring Assets in Violation of the Terms of the Trust Instrument

A transfer of assets in this case would also violate Section 404 of ERISA. Section 404(a)(1)(D) specifically states that a plan fiduciary must "discharge his duties with respect to a plan . . . in accordance with the documents and instruments governing the plan. . . ." 29 U.S.C. § 1104(a)(1)(D). Thus, the trustees of the Greater Funds have an explicit duty under ERISA to adhere to the Greater Funds' trust provisions concerning the use of plan assets. The trust instruments with which the trustees must comply bar the diversion of plan assets to the benefit of an employer.[53]

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whether received by the contributing employers or transferred to Plan Y, are to be included in the gross income of the employers." IRS Priv. Ltr. Rul. 89-48-032 (Sept. 6, 1989); *see also* IRS Priv. Ltr. Rul. 91-36-017 (June 10, 1991). The IRS concluded the proposed transfer of money from one multiemployer plan to another multiemployer plan constitutes taxable income to the employers even though each of the two multiemployer plans had the same participants.

[52] The statute allows "the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake." *Id.*

[53] The Greater Funds' trust instruments provide that "the assets of the Fund and of the Plan shall at no time inure to the benefit

The trust instruments also explicitly provide that no "employee . . . shall have any rights, title or interest in or to the funds or other property of the Trust Fund or any part thereof, except that employees shall have the right to such benefits as may specifically be provided" by the Plan. J.A. at 161-62, 185. Thus, absent a claim for benefits, employees have no right to any plan assets. There is no allegation that the Greater Funds have not honored all benefit claims to which participants are entitled under the terms of the Greater Funds' governing documents and therefore, Respondent Employees have no right to plan assets.

Section 404(a)(1)(A) of ERISA requires the Greater Funds to carry out their plan duties "solely in the interest of the participants and beneficiaries and . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries." 29 U.S.C. § 1104(a)(1)(A). In addition, Section 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), requires that plan trustees comply with strict fiduciary standards in the discharge of their duties. *See Amax Coal Co.*, 453 U.S. at 332. Trustees are therefore required to make all fiduciary decisions,[54] including re-

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of any Employer." Greater Welfare Fund Trust Agreement, J.A. at 162; Greater Pension Fund Trust Agreement, J.A. at 186. They also provide that no "amendment shall permit any return or payments over any part of the then existing Trust Fund to any Employer." Greater Pension Fund Trust Agreement, J.A. at 194; Greater Welfare Fund Trust Agreement, J.A. at 171. This Court has observed that "[b]y the terms of the trust . . . , the trustees are obligated" to apply such provisions. *Robinson*, 455 U.S. at 573. This Court added "the common law of trusts does not alter this obligation." *Id.* at 574.

[54] However, the amendment of a governing plan document, for example, to allow for a transfer of assets, is *not* a fiduciary function. The establishment and amendment of the terms of a plan (in contrast to the administration of those plan terms) are settlor functions not subject to fiduciary standards. When a settlor "decides to establish, amend or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in

quests for asset transfers, by taking into consideration the welfare of the fund and the beneficiaries. A fiduciary may not disburse plan assets to individuals who proclaim some equitable justification for depleting the fund's resources. The only justification for use of plan assets is to provide benefits to participants and beneficiaries and to pay reasonable administrative expenses. There are no allegations that any Respondent is entitled to benefits under the terms of the plan. Nor can Respondents' demand for plan assets be in any way considered a reasonable administrative expense. Thus, it would be a breach of ERISA's strict fiduciary requirements for the trustees of the Greater Funds to transfer assets to the Southern Funds.

CONCLUSION

The Second Circuit decision below has fundamentally misconstrued Section 302(c)(5), and in so doing, has failed to follow this Court's relevant decisions. Section 302(c)(5) does not authorize the federal courts to regulate broadly the administration of employee benefit plans or to review the reasonableness of plan terms. Furthermore, the interpretation of Section 302(c)(5) by the Second Circuit is inconsistent with expressed purposes of ERISA[55] and would actually violate several of ERISA's

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accordance with its terms, its actions are not to be judged by fiduciary standards." *Musto v. American Can Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *see also Barnes v. Lacy*, 927 F.2d 539, 544 (11th Cir.), *cert. denied*, 112 S. Ct. 968 (1992); *Adams v. LTV Steel Mining Co.*, 936 F.2d 368, 370 (8th Cir. 1991); *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075, 1079 (4th Cir.), *cert. denied*, 493 U.S. 919 (1989); *Amato v. Western Union Int'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986); *United Indep. Flight Officers, Inc. v. United Air Lines*, 756 F.2d 1262, 1268 (7th Cir. 1985).

[55] In *NLRB v. Amax Coal Co.*, this Court noted that Congress has adopted as national policy the protection of the stability of multiemployer plans:

> Congress amended ERISA in 1980 to strengthen the funding requirements and enhance the financial stability of multi-

specific statutory requirements. Therefore, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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> employer pension plans. "In these amendments, Congress sought to foster the maintenance and growth of multiemployer pension plans . . . [and] to provide reasonable protection for the interests of the participants and beneficiaries of financially distressed multiemployer pension plans." §§ 3(c)(2) and (c)(3) of the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1209-1210. Section 3(a)(4)(A) of the 1980 Act states that "withdrawals of contributing employers from a multiemployer pension . . . adversely [affect] the plan, its participants and beneficiaries, and labor-management relations. . . ." 94 Stat. 1209. The Court of Appeals' decision therefore runs afoul of express congressional policy favoring multiemployer trusts.

453 U.S. at 339 n.22. The decision of the Second Circuit in the present case "therefore runs afoul of express congressional policy favoring multiemployer trusts." *Id.*

(141)

No. 91-610

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,

Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether the Petitioner welfare and pension trust funds, which have surplus reserves derived in part from contributions made on behalf of the Respondent employees, must transfer a share of those surplus reserves to the welfare and pension trust funds established by Respondents to comply with section 302(c)(5) of the Labor Management Relations Act when the Respondent employees, comprising all of the employees of the Respondent employers, transferred from coverage under the Petitioner pension and welfare funds to the pension and welfare funds established by Respondents?

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In The

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LOCAL 144 NURSING HOME PENSION FUND, ET AL.,

Petitioners,

v.

NICHOLAS DEMISAY, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF FOR THE RESPONDENTS

PRELIMINARY STATEMENT

Respondents, the management trustees of the Local 144-Southern New York Residential Health Care Facilities

Association Pension and Welfare Funds (collectively, the "Southern Funds"), employers and management companies[1] who contribute to the Southern Funds (the "Southern Employers"), and individual employees of the Southern Employers (the "Southern Employees"), respectfully submit this brief on the merits urging this Court to affirm the judgment of the United States Court of Appeals for the Second Circuit in *Demisay v. Local 144 Nursing Home Pension Fund*, 935 F.2d 528 (2d Cir. 1991). The decision of the Second Circuit is found in the appendix to the Petition for *Certiorari* ("Pet. App.") at 1a. The decision of the United States District Court for the Southern District of New York is found in the Pet. App. at 13a.

STATEMENT OF THE CASE

A. Factual Background

Until 1981 the Southern Employers were members of Greater New York Health Care Facilities Association, Inc., a multiemployer bargaining association ("Greater New York") (JA 7, 112-13, 132-33).[2] The Southern Employers contributed to the Local 144 Nursing Home Pension Fund ("Greater Pension Fund") and the New York City Nursing Home - Local 144 Welfare Fund ("Greater Welfare Fund") (collectively, the "Greater Funds"), on behalf of their employees for whom contributions were required to be made (JA 7, 133). The majority of the Southern Employers contributed to the Greater Funds for nearly fifteen years (JA 315, 318, 335, 369, 384).

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[1] Respondent corporations have no parent companies or partially-owned subsidiary companies. Sup. Ct. R. 29.1.

[2] Citations are to the Joint Appendix ("JA") filed with this Court.

The Southern Employers withdrew from Greater New York in 1981 and became members of the Southern New York Residential Health Care Facilities Association, Inc., a nonprofit trade association (the "Southern Association") (JA 7-8, 133). The Southern Employers continued to contribute to the Greater Funds (JA 8, 133). In November 1984, following the expiration and termination of each Southern Employer's 1981 - 1984 collective bargaining agreement with Local 144, Hotel, Hospital, Nursing Home and Allied Services Employees Union, SEIU, AFL-CIO ("Local 144"), the Southern Employers executed new individual three-year collective bargaining agreements with Local 144, effective March 31, 1984 to March 31, 1987 (JA 8, 134). During negotiations leading to these agreements, the Southern Employers and Local 144 discussed the possibility of establishing new pension and welfare funds for the benefit of the Southern Employees (JA 8, 133-34).

The Southern Employers had become increasingly concerned that the Greater Funds were not administered fairly, but instead, certain employers received "special deals" and were not contributing the amounts they were obligated to contribute to the Greater Funds (JA 372-73, 377-78). The Southern Employers, who employed approximately 1,981 employees covered by the Greater Funds (JA 11), believed these special deals threatened the financial condition of the Greater Funds, consequently threatening the employees' expectations of welfare and pension benefits (JA 372-73, 377-78). The Southern Employees were approximately 20% of the employees covered by the Greater Funds.

Each of the collective bargaining agreements that the Southern Employers and Local 144 executed in November 1984 contained an identical provision that Local 144 and the Southern Employers would establish the Southern Funds (JA 8, 29). The Southern Employers negotiated on the basis that the Greater Funds would be obligated under section 302(c)(5) of the Labor Management Relations Act, 1947 ("LMRA"), 29 U.S.C. § 186(c)(5), to transfer that portion of its reserves attributable to contributions made by the Southern Employers on behalf of the

nearly 2,000 Southern Employees (JA 134). The Southern Funds became operational on December 1, 1985 (JA 11, 137).

The Greater Funds and the Southern Funds are multiemployer trust funds established and maintained pursuant to section 302(c)(5) of the LMRA ("Taft-Hartley trust funds") (JA 11, 112). At all relevant times the board of trustees of each of the Southern Funds was comprised of eight persons, four trustees designated by Local 144 as union-appointed trustees and four trustees appointed by the Southern Association as employer-appointed trustees (JA 68, 94-95). The four union-appointed trustees of the Southern Funds were at all relevant times the same individuals who acted as the four union-appointed trustees of the Greater Funds (JA 103, 106, 112).

At the time of the transfer of the Southern Employees to the Southern Funds, the Greater Funds possessed reserves that were derived, in part, from contributions received from the Southern Employers on behalf of their participant employees, and/or from the income therefrom (JA 129-131).[3] These reserves have not and will not be used by the Greater Funds to provide benefits to the Southern Employees (*id.*).

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[3] Petitioners claim, without any factual support in the record, that this "case does not raise issues regarding excess assets in benefit plans" because the Greater Welfare Fund "has been struggling to maintain health benefit levels" and the Greater Pension Fund "provides a modest maximum pension." Brief for the Petitioners ("Pet. Brief") at 4. The financial condition of the Greater Funds at the current time is irrelevant. The relevant inquiry is the financial condition of the Greater Funds at the time the Southern Employees transferred to the Southern Funds. Further, the Greater Funds' allegations about the financial condition of the Greater Welfare Fund were not raised in the district court or the court of appeals and therefore, are not properly before this Court for review. *See Patrick v. Burget*, 486 U.S. 94, 99 n.5 (1988).

The collective bargaining agreements executed by the Southern Employers and Local 144 in November 1984 provided that the Southern Funds would guarantee the Southern Employees, for the three year period ending March 31, 1987, the same level of benefits as provided by the Greater Funds as of April 1, 1984 (JA 29). When the 1984-87 collective bargaining agreements expired, the Southern Employers' obligation to provide the same level of benefits terminated (JA 270). In fact, since the expiration of the 1984-1987 collective bargaining agreements, the welfare benefits to the Southern Employees have decreased (JA 271, 284).[4]

B. The Proceedings Below

Respondents commenced this action in August 1985 against Petitioners in the United States District Court for the Southern District of New York (JA 3-4). Respondents' first cause of action alleges that the Greater Funds are structured and administered in violation of section 302(c)(5) of the LMRA for failing to transfer to the Southern Funds Respondents' aliquot share of surplus reserves attributable to contributions made by the Southern Employers for the benefit of Southern Employees (JA 11-12). Respondents' second cause of action alleges that the trustees of the Greater Funds breached their fiduciary duties under section 404(a) of the Employee Retirement Income Security Act of 1974, *as amended*, ("ERISA"), 29 U.S.C. § 1104(a), by failing to transfer the Southern Employees' share of reserves (JA 12-13). In the third cause of action Respondents allege that the Petitioner trustees violated section 4234(a) of ERISA, and breached their fiduciary duties in violation of section 404(a)(1)(A) and (D) of ERISA, by failing to promulgate asset transfer rules (JA 13-15).

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[4] The district court specifically noted that because the Greater Funds did not transfer reserves to the Southern Funds, "there has already been a restructuring of the Southern Funds benefit plan and one form of benefit was dropped after collective bargaining." Pet. App. at 18a n.7.

In April 1987 Respondents moved for partial summary judgment as to Petitioners' liability on all three causes of action on the grounds that there were no genuine issues of material fact that the Greater Funds refused to transfer Respondents' aliquot share of reserves, that the Greater Funds did not have asset transfer rules and that Petitioner trustees failed to transfer reserves and failed to adopt asset transfer rules (JA 123). Petitioners moved to dismiss the first cause of action as against all Respondents for lack of standing and jurisdiction, the second cause of action as against the Southern Employees for lack of standing, and the third cause of action as against all Respondents for lack of standing. Petitioners also cross-moved for summary judgment on all three claims.

By order dated March 15, 1989, the district court denied Respondents' motion for partial summary judgment, granted Petitioners' motion to dismiss the third cause of action for lack of standing and granted Petitioners' motion for summary judgment on the first and second causes of action (Pet. App. 29a). The district court held that because there was no change in collective bargaining representative, a transfer of reserves from the Greater Funds to the Southern Funds was not warranted under section 302(c)(5) (Pet. App. 21a). In reaching its decision, the district court concluded that a transfer would primarily benefit the Southern Employers, not the Southern Employees (Pet. App. 20a-21a), and that section 302(c)(5) was an exception to a criminal statute primarily intended to address union corruption (Pet. App. 23a).

Respondents appealed to the Court of Appeals for the Second Circuit. On June 12, 1991 a three judge panel of the Second Circuit unanimously reversed the judgment of the district court (Pet. App. 12a). The Second Circuit, rejecting Petitioners' argument that ERISA, rather than the LMRA, controlled the issue on appeal, concluded that because all of the Southern Employees transferred from the Greater Funds, the reserves in the Greater Funds, attributable in part to contributions made by the Southern Employers for the benefit of the Southern Employees, could never be used for their benefit as mandated by the statutory language of section 302(c)(5) (Pet. App. 11a). The Second Circuit rejected

Petitioners' claims that section 302(c)(5) should be interpreted to permit contributions by the Southern Employers to be used solely for the benefit of the other employees in the Greater Funds, to the exclusion of the Southern Employees (Pet. App. 9a-10a). The Court of Appeals also noted that its holding did not, contrary to Petitioners' fears, require multiemployer plans to directly match employer benefits to employer contributions (Pet. App. 10a). The Second Circuit remanded with instructions to enter partial summary judgment for Respondents and to determine the amount of excess reserves to be transferred from the Greater Funds to the Southern Funds (Pet. App. 11a-12a). The Second Circuit found it unnecessary to reach the merits of the remaining two claims (Pet. App. 12a).

Petitioners filed a petition for a writ of *certiorari* on October 10, 1991. This Court granted the petition for a writ of *certiorari* on June 22, 1992.

SUMMARY OF ARGUMENT

Congress, in section 302(c)(5) of the LMRA, expressly provided that employers may contribute to a Taft-Hartley trust fund only if, *inter alia*, those contributions are used "for the sole and exclusive benefit of the employees of such employer, and their families and dependents," or for the benefit of such employees "jointly with" the employees of other employers. The plain meaning of this provision is an employer's contributions must be used for the benefit of its employees, or for its employees together with employees of other contributing employers to the fund. An employer's contributions may not be used only for the benefit of employees of other contributing employers.

In the instant case contributions made by the Southern Employers to the Greater Funds for the benefit of the Southern Employees created surplus reserves in the Greater Funds. Because all of the Southern Employees transferred from the Greater Funds to the Southern Funds, the Greater Funds will not use their surplus

reserves, even in part, for the benefit of the Southern Employees. This structural defect in the Greater Funds must be remedied by requiring each of the Greater Funds to transfer a share of their surplus reserves to the Southern Funds.

The purpose of section 302(c)(5), and the legislative history of the LMRA, reinforce the application of the plain language of section 302(c)(5) to order a transfer under the circumstances of this case. Congress enacted section 302(c)(5) to ensure that employees are not deprived of the benefit of the contributions created by their labor. Without a transfer here, the benefit of the contributions attributable to the labor of the Southern Employees will be used solely for the benefit of other employees. A transfer of a share of the surplus reserves in the instant case furthers the congressional intent because it ensures that the Southern Employees benefit from the contributions that created the surplus reserves in the Greater Funds.

Contrary to the argument of Petitioners, the transfer ordered here does not create a broad rule allowing any employer to claim assets from a trust fund if that employer leaves the fund. The rule proposed by Respondents requires a transfer under section 302(c)(5) only when all of the employees of a contributing employer transfer from a Taft-Hartley trust fund and that trust fund has surplus reserves. A transfer here does not interfere with the pooling of assets and liabilities in multiemployer benefit plans, nor require trust funds to segregate contributions by employer. It requires only that the Greater Funds transfer a proportionate share of their pooled surplus reserves to the Southern Funds.

There is nothing in the statutory language or legislative history of ERISA that overrides or modifies section 302(c)(5)'s strict statutory requirements regulating Taft-Hartley trust funds. In fact, ERISA's provisions requiring transfers under certain circumstances indicates that Congress believes transfers can be accomplished without jeopardizing multiemployer plans. A transfer in the instant case gives effect to the plain meaning of section 302(c)(5) in a manner consistent with ERISA.

ARGUMENT

I.

SECTION 302(c)(5) OF THE LMRA COMPELS A TRANSFER OF SURPLUS RESERVES FROM THE GREATER FUNDS TO THE SOUTHERN FUNDS

The Court of Appeals correctly held that the Greater Funds violated section 302(c)(5) of the LMRA under the circumstances present in the instant case. The statutory language, purpose and legislative history of section 302(c)(5) mandates that employer contributions to a Taft-Hartley trust fund must be used for the benefit of the employer's employees, or for the benefit of the employer's employees jointly with employees of other employers contributing to the fund. In this case the Greater Funds retained surplus reserves, derived in part from contributions made on behalf of the Southern Employees by the Southern Employers, when all of the Southern Employees transferred from coverage under the Greater Pension and Welfare Funds to the Southern Pension and Welfare Funds.[5] Those contributions cannot be used by the Greater Funds for the benefit of the Southern Employees, or for the benefit of the Southern Employees together with the other employees. The transfer ordered here rests squarely on the plain meaning of section 302(c)(5) and furthers the congressional intent

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[5] The Second Circuit's holding recognizes that "when all the employees of any employer are removed from a fund, there is no chance," that any of the employees will benefit from the contributions made on their behalf unless there is a "reallocation of reserves." Pet. App. at 11a. While the Second Circuit's decision does not specifically identify those reserves as surplus, in this case Respondents seek only the Southern Employees' proportionate share of the surplus reserves in the Greater Funds. Surplus reserves are the amount of a fund's assets in excess of its liabilities.

to protect the right of employees to the benefits for which they have worked.

A. The Plain Meaning Of The Statutory Language In Section 302(c)(5) Requires A Transfer of Surplus Reserves

Section 302(a) of the LMRA generally prohibits employers from paying any money to any representative of their employees. 29 U.S.C. § 186(a). Section 302(c)(5), however, sets forth an exception to the general rule by permitting employers to contribute money to a Taft-Hartley trust fund for the payment of welfare and pension benefits to their employees if certain specific statutory requirements are met. 29 U.S.C. § 186(c)(5). The first requirement, the "sole and exclusive benefit" rule, is the basis for the Second Circuit's decision.[6] It mandates that employer contributions be used

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[6] The statute sets forth seven requirements in addition to the "sole and exclusive benefit" requirement that must be satisfied by Taft-Hartley trust funds to qualify for the section 302(c)(5) exception. The contributions and income thereon must be held in trust. The funds may be used only to pay for certain benefits enumerated in the statute, such as medical or hospital care costs, retirement pensions, compensation for injuries, life insurance and other such benefits. There must be a written agreement detailing the basis on which payments to employees will be made. The employees and the employers must be equally represented in the administration of the trust fund. The written agreement must provide that if the two groups deadlock on the administration of the fund, an impartial umpire will decide the dispute. There must be an annual audit of the trust fund, with the results available for inspection by interested persons. There must be a separate trust fund established for employer contributions intended to be used for the payment of pensions or annuities. 29 U.S.C. § 186(c)(5).

> "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents ***jointly with*** the employees of other employers making similar payments, and their families and dependents)."

29 U.S.C. § 186(c)(5) (emphasis added).

The issue before the Court turns on the meaning of the term "jointly with." In particular, the issue is whether the contributions of an employer must be used, at least in part, for the benefit of its own employees, or whether the contributions may be used solely for the benefit of "the employees of other employers."

By its plain terms the statute does not permit contributions of one employer to be used only for the benefit of the employees of other employers. The language of section 302(c)(5) limits the exception provided in that section to two, and only two, situations: when the contributions of the employer are used for the benefit of its employees (and their families and dependents); or when the contributions are used for the benefit of that group "jointly with" the employees (and families and dependents) of "other employers making similar payments." Nowhere does the statute provide an exception for use of the contributions of one employer solely for the benefit of the employees of "other employers making similar payments."

To create such an exception, the statute would need to have been written in quite different terms. A provision stating that contributions must benefit employee group A, or employee group A "jointly with" employee group B, does not contemplate that contributions benefit only employee group B. The term "jointly with" is a conjunctive term, not a disjunctive one. If Congress had wished to allow use of employer contributions only for the benefit of employee group B, it would have written the statute to state that employer A's contributions must be used to benefit employee group A *or* employee group B, or to benefit employee groups A and B jointly.

Properly read, the term "jointly with" does not mean that funds contributed by one employer to a Taft-Hartley trust fund may be used for the benefit of the employees of some other employer, without also benefiting its own employees. Rather, it simply allows trust funds to pool employer contributions for the benefit of both groups of employees together. Section 302(c)(5) does not require a Taft-Hartley trust fund to segregate an employer's contributions for use only by the employer's employees, as long as those employees are receiving the benefit of the funds as a whole. But the "sole and exclusive benefit" provision does require that the contributing employer's employees derive benefit from the contributions.

The Greater Funds admit they have reserves attributable, in part, to contributions received from the Southern Employers on behalf of the Southern Employees (JA 129-31). The Greater Funds admit these reserves are not being used to pay or provide benefits to the nearly 2,000 Southern Employees, who comprised nearly 20% of the employees covered by the Greater Funds (*id.*). The Greater Funds instead will use the surplus reserves for the benefit of employees other than the Southern Employees. Because the Southern Employees will not benefit from the surplus reserves created by contributions made on their behalf, the Greater Funds cannot satisfy the plain language in section 302(c)(5) that contributions made by the Southern Employers benefit the Southern Employees, or the Southern Employees jointly with employees of other contributing employers.

Respondents do not contend that the "jointly with" term means that the contributing employer's employees must receive a certain amount of tangible benefits. Employees benefit when they receive health insurance -- even if they do not actually use the insurance. Employees benefit when they earn pension credits -- even if they never receive a pension. Employees do not benefit from contributions, however, when those contributions are used to create surplus reserves. Only those employees who participate in

the trust fund at the time the surplus reserves are used by the fund benefit from the contributions used to create the surplus reserves.[7]

This can be seen by looking at how a pooled Taft-Hartley trust fund operates. If three employers, A, B and C, contribute to the fund on behalf of their employees pursuant to collective bargaining agreements, the trust fund pools the contributions and the income thereon, and uses them to pay benefits and administrative expenses. The amount of the trust fund's pooled assets in excess of its pooled liabilities are surplus reserves. The employees of Employers A, B and C benefit from the contributions made on their behalf through welfare and pension coverage. If some of Employer A's employees leave the fund, the employees of Employer A who remain in the fund continue to benefit from Employer A's contributions. If all of Employer A's employees transfer from this fund, however, none of Employer A's employees will benefit from the contributions made by Employer A that created the surplus reserves. Instead, the trust fund will use the surplus reserves solely for the benefit of employees of Employers B and C. Without a transfer of a share of the surplus reserves, Employer A's contributions have not been used for the benefit of Employer A's employees jointly with employees of Employers B and C.

This Court repeatedly has stated that courts should interpret a statute to give effect to the plain meaning of the statutory language. *Patterson v. Shumate*, 112 S. Ct. 2242, 2247 (1992);

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[7] Certain Southern Employees earned a vested nonforfeitable right to a pension of a fixed amount from the Greater Pension Fund. The Greater Pension Fund is obligated to pay them their pensions. These Southern Employees will not benefit, however, from the surplus reserves their labor created. The Greater Funds admitted, in response to Plaintiffs' First Request for Admission of Facts pursuant to Rule 36 of the Federal Rules of Civil Procedure, that the reserves are not being used to pay or provide benefits to the Southern Employees (JA 129-31).

INS v. Cardoza-Fonseca, 480 U.S. 421, 431-32 (1987); *United States v. James*, 478 U.S. 597, 604 (1986). Indeed, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The Second Circuit's reallocation of surplus reserves in this case gives effect to the plain meaning of "jointly with" in section 302(c)(5)'s sole and exclusive benefit provision because it ensures that the Southern Employers' contributions are used for the benefit of the Southern Employees.

B. The Second Circuit's Decision Furthers The Purpose of Section 302(c)(5)

Nothing in the legislative history of the LMRA justifies departure from the plain meaning of the statutory language. *Shumate*, 112 S. Ct. at 2248 (when text of statute is clear, plain meaning is dispositive and proponent of interpretation that is contrary to plain meaning bears an "exceptionally heavy" burden of persuasion) (*quoting Union Bank v. Wolas*, 112 S. Ct. 527, 530 (1991)); *see also James*, 478 U.S. at 606. In fact, the legislative history of the LMRA and the purpose of section 302(c)(5) reinforces the interpretation of "jointly with" proposed by Respondents.

Congress enacted section 302(c)(5) to "protect the rights of employees to benefits out of these funds which are created by their own labor." 93 Cong. Rec. 5147 (1947) (remarks of Sen. Ball), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1498 (1948) [hereinafter Leg. Hist.]. Congress recognized that "on any reasonable basis, payments by an employer to such a fund are in effect compensation to his employees." 93 Cong. Rec. 4882, *reprinted in* 2 Leg. Hist. at 1321. In fact, as Senator Taft, the sponsor of the LMRA, remarked, the money for welfare funds is "money earned by the employees," in effect, money that is "deducted from the wages of the employees." 93 Cong. Rec. 4876, *reprinted in* 2 Leg. Hist. at 1311. This Court also has recognized that

employer contributions to Taft-Hartley trust funds are "really another form of compensation to the employees." *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 469 (1960). Indeed, absent a contractual requirement to contribute to a trust fund, the Second Circuit noted, "an employer could use these same funds to pay higher wages to its employees." Pet. App. at 9a (*citing Bey v. Muldoon*, 223 F. Supp. 489, 495 (E.D. Pa. 1963) ("If an employer agreed to give five cents to a union trust fund for every hour of work by an employe [*sic*], the hourly wage paid directly to the employe [*sic*] would be five cents less"), *aff'd*, 354 F.2d 1005 (3d Cir.), *cert. denied*, 384 U.S. 987 (1966).

Congress intended the structural requirements of section 302(c)(5) to ensure that there was no diversion of trust fund monies from the employees whose labor created those funds. Without section 302(c)(5)'s statutory restrictions on trust funds, Senator Taft noted, "the employees for whose benefit it [a trust fund] is supposed to be established, for certain definite welfare purposes, will have no legal rights and will not receive the kind of benefits to which they are entitled after such deductions from their wages." 93 Cong. Rec. 4877, *reprinted in* 2 Leg. Hist. at 1312. This Court has recognized the legislative intent of section 302(c)(5) to protect employees' right to the funds they created:

> "the 'sole purpose' of § 302(c)(5) is to ensure that employee benefit trust funds 'are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them. . . .' 93 Cong. Rec. 4678 (1947). Senator Ball stated that 'all we seek to do by [§ 302(c)(5)] is to make sure that the employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that, if necessary, they can go into court and obtain the benefits to which they are entitled.'" (citations omitted.)

NLRB v. Amax Coal Co., 453 U.S. 322, 331 (1980).

Congress did not intend section 302(c)(5) simply to allow employers to build a surplus reserve of funds. The contributions represent monies that would otherwise have been paid to employees in the form of wages. To be lawful under section 302(c)(5), employer contributions must be used for their intended purpose -- to benefit, in the form of pension and welfare benefits, the employer's employees. 29 U.S.C. § 186(c)(5).

A transfer of a proportionate share of surplus reserves from each of the Greater Funds to the Southern Funds advances section 302(c)(5)'s purpose by ensuring that the Southern Employees benefit from the funds created by their labor. Without a transfer of a share of surplus reserves in this case, the contributions and surplus reserves created by the Southern Employees' labor will not be used for their benefit. The Southern Employees, who gave up higher wages for years so their employers would contribute to the Greater Funds, are entitled to benefit from the surplus reserves created by the contributions.

The transfer ordered here also furthers the broader congressional intent of the LMRA to protect the rights of employees in their relations with employers and labor unions. 29 U.S.C. 141(b). If this Court does not affirm the Second Circuit's decision, the Southern Employees will lose the benefit of their labor solely because they exercised their rights under the National Labor Relations Act, *as amended*, and agreed with the Southern Employers in collective bargaining to transfer from the Greater Funds to the Southern Funds.

II.

A TRANSFER UNDER CIRCUMSTANCES PRESENT HERE CREATES A WORKABLE RULE THAT ACHIEVES THE GOAL OF SECTION 302(c)(5) AND DOES NOT UNDERMINE THE OPERATION OF MULTIEMPLOYER PLANS

Petitioners raise several arguments to circumvent the application of the "jointly with" language of section 302(c)(5). Because Petitioners cannot identify any clearly expressed legislative intention contrary to the plain meaning of section 302(c)(5), they argue instead that the legislative history does not support the proposition that Congress intended "to confer on the federal courts authority to oversee the administration of employee benefit plans." Pet. Brief at 8. Both Petitioners and the Solicitor General of the United States, as *amicus curiae* ("Solicitor General"), categorize section 302(c)(5) as only a criminal statute not intended to set standards for Taft-Hartley trust funds. Pet. Brief p. 9; Solicitor Gen. Brief p. 14. Petitioners and the Solicitor General also argue that this Court should ignore the statutory language and purpose of section 302 of the LMRA because the transfer ordered here is difficult to effect and would interfere with the operation of multiemployer plans.[8] Pet. Brief p. 24-28; Solicitor Gen. Brief p. 21-23.

A. Federal Courts Have Authority To Remedy Violations Of Section 302(c)(5) In Civil Cases

In section 302(e), Congress expressly granted authority to the "district courts of the United States" to restrain violations of section 302. 29 U.S.C. § 186(e). The plain language of the

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[8] The argument by Petitioners and the Solicitor General that ERISA, rather than the LMRA, controls the issue here is addressed *infra* in Section III, p. 28-35.

statute states that federal courts have authority to review employee benefit plans under section 302 of the LMRA. In *United Mine Workers of Am. Health & Retirement Funds v. Robinson*, 455 U.S. 562, 573 n.12 (1982), this Court stated, "[i]t is, of course, clear that compliance with the specific standards of § 302(c)(5) in the administration of welfare funds is enforceable in federal district courts under § 302(e) of the LMRA." In *Arroyo v. United States*, 359 U.S. 419, 426-27 (1959), this Court noted that "[c]ontinuing compliance with these standards [section 302(c)(5)] in the administration of welfare funds was made explicitly enforceable in federal district courts by civil proceedings under § 302(e)."

Petitioners' claim that the Second Circuit has no authority to consider whether the Greater Funds violated section 302(c)(5) is based on an erroneous reading of this Court's decision in *Robinson*. Pet. Brief p. 19. *Robinson* involved a claim by widows of coal miners that a provision in the collective bargaining agreement distinguishing between the benefits available to widows of pensioners and widows of pension-eligible mine workers had no rational relationship to the purpose of the trust fund and therefore was unlawful under section 302(c)(5). 455 U.S. at 567-68. This Court held that federal courts do not have authority under section 302(c)(5) to review for reasonableness the provisions of a collective bargaining agreement that allocates benefits among participants of a welfare fund. *Id*. at 574.

In this case, unlike *Robinson*, Respondents do not challenge the reasonableness of any collectively bargained term between the Southern Employers and Local 144, or between the employers contributing to the Greater Funds and Local 144.[9]

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[9] The mere reference in the collective bargaining agreements between Greater New York and Local 144 to the Greater Funds' trust agreements do not make the provisions of the trust agreements collectively bargained terms. Pet. Brief p. 19. The Greater Funds' trust documents provide that each may be amended at any time by written agreement of the trustees (JA 170-71, 194). This power is not controlled by the employers or

Nor do Respondents question any decision of the Greater Funds' trustees with respect to the payment of pension or welfare benefits to any participant of the Greater Funds. Respondents seek only the enforcement of section 302(c)(5)'s "sole and exclusive" benefit requirement that the Southern Employers' contributions to the Greater Funds be used for the benefit of the Southern Employees, or for the benefit of the Southern Employees jointly with the employees of the other contributing employers. The Court's affirmance of a transfer of a proportionate share of surplus reserves in the instant case does not judge the reasonableness of any provision in any collective bargaining agreement.

B. The Scope Of Section 302(c)(5) Extends Beyond Acts Of Union Corruption

Contrary to the argument of Petitioners and the Solicitor General, this Court's decisions recognize that Congress intended the structural requirements in section 302(c)(5) to do more than merely guard trust fund assets from misuse by union officials. If guarding against union misuse had been Congress' sole objective, the "sole and exclusive benefit" provision would have been drafted with greater precision specifically to provide that employer contributions could not be used for union purposes.[10] *See James*, 478 U.S. 597, 609 (1986). Instead, Congress chose to draft section 302(c)(5) broadly to ensure that contributions made to trust

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employees in collective bargaining. This Court has rejected the proposition that the administration of a Taft-Hartley trust fund is "collective bargaining" within the meaning of federal labor laws. *Amax Coal*, 453 U.S. at 337 n.12.

[10] Even assuming, *arguendo*, that in 1947 Congress was concerned primarily with combating union corruption, the "fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning." *Union Bank*, 112 S. Ct. at 531.

funds were not diverted by anyone from the employees whose labor created the funds.[11]

This Court has never restricted the application of section 302(c)(5) to cases that involve allegations of corruption by union officers, or claims that the union is diverting trust fund assets from the participants in the plan. In *Walsh v. Schlecht*, 429 U.S. 401 (1977), for example, all members of this Court concluded that a provision of a collective bargaining agreement, requiring a general contractor to contribute to Taft-Hartley trust funds with respect to work performed by employees of a nonsignatory subcontractor, would violate section 302(c)(5) if interpreted to require contributions "on behalf of" those employees. 429 U.S. at 407. The subcontractor's employees were not eligible for benefits from the funds. *Id.* Justice White, in dissent, agreed with the majority's conclusion on this issue and noted, "the provision is illegal because the employees of the noncontributing contractor may not be a beneficiary of the trust funds, even though the contributions are made with respect to them."[12] *Id.* at 412.

There were no allegations in *Walsh* of corrupt behavior by union officials, or a danger that the union was diverting assets from participants for union purposes. 429 U.S. at 403-06. The

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[11] For example, the last structural requirement in section 302(c)(5) -- mandating the creation of a separate trust for contributions intended to provide pension benefits -- protects participants in pension plans against use of their assets to provide welfare benefits. The establishment of separate trust funds for pension benefits and welfare benefits provides no inherent protection against misuse of funds by union officers.

[12] Justice White dissented from the majority's view in *Walsh* that the provision did not violate section 302(c)(5) because it should be interpreted to require the employer to contribute funds to the welfare plan measured by the hours of work performed by the subcontractor's employees. 429 U.S. at 412.

same is true of at least two other decisions of this Court involving section 302(c)(5). *See Lewis*, 361 U.S. 459, 471 (1960) (Court rejected argument that an employer who had a judgment in its favor against the union representing its employees for violations of the collective bargaining agreement may offset that liability against the contributions the employer owes to a Taft-Hartley welfare fund under the collective bargaining agreement, in part because this would violate the "sole and exclusive benefit" provision in section 302(c)(5)); *Amax Coal*, 453 U.S. 322, 336 (1981) (Court concluded that employer trustees of a Taft-Hartley trust fund are not "representatives" for collective bargaining purposes, in part because the "atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by § 302(c)(5)," prohibits a trustee from acting in any way contrary to the interests of the beneficiaries). There is no reason this Court should now limit its reading of section 302(c)(5).

Although it is unnecessary to allege union corruption or diversion of assets for union purposes before a federal court has authority to find a violation of the statutory requirements of section 302(c)(5), the Southern Employers' desire to create new pension and welfare funds for their employees arose out of a concern that the Greater Funds were not administered fairly. The Southern Employers believed that certain employers were not making their proper contributions to the Greater Funds, potentially harming the financial condition of the Greater Funds and eventually affecting the Greater Funds' ability to provide the same level or an increased level of benefits to employees (JA 372-73, 377-78). The creation of the Southern Funds was intended to ensure that the statutory requirements of section 302(c)(5) were met and the Southern Employees received the benefit of the contributions made on their behalf.

C. Respondents Propose a Narrow Rule That Meets The Requirements of Section 302(c)(5) In A Manner Consistent With the Operation of Multiemployer Plans

Petitioners and *amici curiae* argue that section 302(c)(5) should be read to permit the Greater Funds to use all of their surplus reserves solely for the benefit of the employees remaining in the Greater Funds, to the exclusion of the Southern Employees, because a contrary decision would create a broad rule that permits an employer to take trust fund assets whenever an employer leaves a fund. This broad rule, Petitioners and the *amici curiae* claim, is inconsistent with the operation of multiemployer plans and would undermine the entire multiemployer benefit plan system.[13] These arguments are unmerited.

1. Respondents Propose A Narrow Workable Rule That Achieves The Goals of Section 302(c)(5)

The rule Respondents urge the Court to apply in the instant case does not create a broad transfer rule, but instead, recognizes that a transfer of assets from a Taft-Hartley trust fund is necessary to satisfy the statutory language of section 302(c)(5) only in limited factual circumstances. A transfer is required only when: (1) all of the employees of the contributing employer transfer from the fund; and (2) the transferor fund has surplus reserves. If both

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[13] The National Coordinating Committee for Multiemployer Plans; the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds; and the Western Conference of Teamsters Pension Trust Fund submitted briefs as *amicus curiae* also arguing that the Second Circuit's decision undermines the operation of multiemployer plans because it prohibits the pooling of assets and liabilities in multiemployer plans and permits an employer to take assets whenever it chooses to leave a plan. As demonstrated herein, these arguments are unmerited.

factors are present, a transfer of a share of reserves from the transferor trust fund is necessary because the transferor trust fund holds contributions that are not being used, as required by section 302(c)(5), for the benefit of the transferred employees.

As explained in the example on page 13, *supra*, under the rule proposed by Respondents, a transfer is not required under section 302(c)(5) if only some of the employees of an employer leave a Taft-Hartley trust fund.[14] Because some of the contributing employer's employees remain in the fund, the trust fund can use its contributions to benefit those employees jointly with employees of other contributing employers. There would be no violation of section 302(c)(5)'s strict statutory requirements under these circumstances.[15]

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[14] For example, in *O'Hare v. General Marine Transp. Corp.*, 740 F.2d 160, 173 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985), the Second Circuit did not order a transfer of reserves when only a few employees left a pension fund. *O'Hare* involved a claim by an employer that section 302(c)(5) mandated a return of contributions it made to a pension fund on behalf of group of employees who voluntarily left its employ and joined a different union and pension plan. The Second Circuit rejected the employer's argument, noting that, because only a few employees left the pension fund and many of the employer's employees remained in the pension fund, the employees would share jointly with other employees in the benefits of the pension fund as required by section 302(c)(5). *Id.* at 173.

[15] The trustees of the trust fund would not, however, have the unfettered right to deny a transfer under these circumstances. The trustees' decision would be subject to their fiduciary obligations to the transferor fund's participants who withdraw from the trust fund. Those fiduciary duties may arise under section 302(c)(5) or under ERISA. *See Amax Coal*, 453 U.S. at 332. In *Robinson*, this Court left open the question of "whether federal courts sitting as courts of equity are authorized to

It also would not be necessary to transfer reserves under section 302(c)(5) when there are no surplus reserves in the trust fund. In that situation all of the employer contributions to the Taft-Hartley trust fund would have been used already for the employees participating in the fund. For example, if the Southern Employees transferred from the Greater Funds to the Southern Funds when there was a deficit in the Greater Funds, or when the assets in the Greater Funds exactly matched the benefits owed to participants and beneficiaries, all of the monies paid into the Greater Funds by contributing employers would have been used for the benefit of the Southern Employees, jointly with the employees of the other contributing employers. Because there are surplus reserves in the Greater Funds, however, the Greater Funds hold assets, attributable in part to contributions made on behalf of the Southern Employees, that will not be used in any way for the benefit of the Southern Employees.

The Solicitor General recommends that a court should judge the refusal of the Greater Funds' trustees to transfer reserves in this case under ERISA's fiduciary duty standard. Solicitor Gen. Brief p. 23. A discretionary standard does not ensure compliance with section 302(c)(5). In addition, as a practical matter, when all of an employer's employees have transferred from a fund, the trustees of the transferor fund may have difficulty balancing the interests of the employees remaining in their fund with the interests of the transferred employees in determining whether to transfer assets. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 173 (1971) (Court noted that there was a risk the union "would be bound to balance" the interests of active employees in the bargaining unit with the interests of retired employees in a way that favored the interests of the active employees). Indeed, there is nothing in the record to indicate that the trustees of the Greater Funds gave any consideration to transferring excess reserves to the Southern Funds when all of the Southern Employees transferred (JA 113, 115).

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enforce" the "traditional fiduciary duties" imposed on trustees by section 302(c)(5). 455 U.S. at 573 n.12.

2. The Rule Respondents Propose Does Not Interfere With The Operation Of Multiemployer Plans

A transfer of surplus reserves from one multiemployer plan to another is neither a novel occurrence nor a threat to the operation of multiemployer plans. In ERISA, for example, Congress provided that transfers from one multiemployer benefit fund to another may be necessary in three situations: (1) when plan trustees have a fiduciary obligation to transfer; (2) when employees change collective bargaining representatives and such change causes the employees to be covered by another pension fund; and (3) when a pension fund's asset transfer rules require a transfer. 29 U.S.C. §§ 1104, 1415, 1414.[16] When it enacted the foregoing provisions, Congress obviously believed that transfers between multiemployer benefit plans could be accomplished without impeding the operation of multiemployer plans.

Contrary to Petitioners' argument, a transfer in the circumstances presented here does not require multiemployer plans to segregate contributions by each contributing employer, or directly match contributions and payment of benefits to employees. Under the rule proposed by Respondents, a multiemployer benefit plan must simply determine, in the event all the employees of a contributing employer leave the fund, whether the transferor fund has surplus reserves at that time. This determination is made on a pooled; not an individual, basis.

As a remedy in this case, the district court may calculate the amount to be transferred from the Greater Funds to the Southern Funds based on each of the Greater Funds' pooled performance. For example, the Southern Welfare Fund would be

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[16] As discussed herein, the situations set forth in ERISA are not intended to be exclusive. Rather, Congress intended both the LMRA and ERISA to apply to Taft-Hartley trust funds. *See* pages 28 29, *infra*.

entitled to the average ratio of the Southern Employers' contributions to the total contributions to the Greater Welfare Fund as a percentage of the increase in the Greater Welfare Fund's surplus reserves during the time the Southern Employers contributed to the Greater Welfare Fund. *See Local 50, Bakery & Confectionary Workers v. Local 3, Bakery & Confectionary Workers*, 733 F.2d 229, 238 (2d Cir. 1984). The amount would be increased by an appropriate interest factor to reflect the fact that the Southern Funds were entitled to the transfer when the Southern Employees withdrew from the Greater Funds.

Petitioners and the *amici curiae* argue that this Court should not give effect to the plain meaning of section 302(c)(5) because a transfer of reserves will result in plan failures and cause a significant number of employers to withdraw from multiemployer plans. As discussed at pages 22-23, *supra*, transfers would occur only when the transferor fund has surplus reserves at the time all of the employees of a contributing employer leave the fund. Section 302(c)(5)'s requirements would require only a portion of the surplus to be transferred from one trust fund to another trust fund. Transfers under these circumstances will not cause multiemployer funds to fail because the transferor fund would retain the share of its surplus reserves it is not required to transfer.

The Court's affirmance of the transfer ordered here will not encourage significant employer withdrawals from multiemployer plans. Employers cannot unilaterally cease to contribute to a Taft-Hartley trust fund and cause a transfer of funds. An employer may transfer from one fund to another only if it has agreed with the collective bargaining representative of its employees to transfer from the fund, or if it has the right to do so pursuant to the National Labor Relations Act.[17]

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[17] An employer may transfer from a fund under the National Labor Relations Act only if their employees decertify their collective bargaining representative, or if the employer bargains to impasse with the union concerning transfer. 29 U.S.C. § 159(c); *NLRB* v. *Katz*, 369 U.S. 736, 745 (1962).

Since the Second Circuit's 1984 decision in *Local 50*, 733 F.2d 229, which recognized the necessity, under certain circumstances, to transfer reserves under section 302(c)(5), only three decisions, other than the instant case, have addressed the issue of interfund transfers under section 302(c)(5). In each of these cases the claim arose from disputes between labor unions over the disposition of trust fund reserves -- not as a result of a withdrawal by an employer from a multiemployer plan.[18] None of these cases involved the termination of any multiemployer benefit plan. In fact, as in the instant case, plaintiffs in all of the cases sought a transfer of reserves from one multiemployer fund to another multiemployer fund. *See Sheet Metal Workers' Local 28 of New Jersey Welfare Fund v. Gallagher*, 960 F.2d 1196, 1199 (3d Cir. 1992) (certain local unions affiliated with the international union sought a transfer of reserves from pension and welfare funds maintained by an independent local after a group of employees transferred coverage); *Stinson v. Ironworkers Dist. Council of S. Ohio and Vicinity Benefit Trust*, 869 F.2d 1014, 1019 (7th Cir. 1989) (union local that withdrew from a trust fund sought a transfer of reserves to a new multiemployer welfare plan it had established after the withdrawal); *Operative Plasterers and Cement Masons Int'l Ass'n Local 202 v. Board of Trustees of the Plastering Indus. Welfare and Pension Trust Funds*, 710 F. Supp. 42, 46 (E.D.N.Y.) (local union sought a transfer of pension and welfare benefit reserves contributed to another local union on behalf of its employees), *appeal dismissed*, 888 F.2d 1376 (2d Cir. 1989). *Local 50* and its progeny indicate that this Court's adoption of Respondents' rule will not cause a significant number of employer withdrawals from multiemployer plans.

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[18] The Second Circuit's decision in *O'Hare* involved a claim for a return of contributions, not a claim for a transfer by an employer who withdrew from a fund. 740 F.2d at 166.

III.

A TRANSFER OF RESERVES UNDER SECTION 302(c)(5) IS CONSISTENT WITH ERISA

Petitioners and the Solicitor General argue that detailed provisions in ERISA concerning transfers of assets and liabilities between multiemployer pension plans implicitly repealed or in some way limited the statutory requirements of section 302(c)(5). Pet. Brief p. 20-22; Solicitor Gen. Brief p. 16-21. Petitioners also attempt to create a conflict between ERISA and the LMRA by arguing that a transfer of reserves under section 302(c)(5) violates or undermines ERISA.

A. ERISA Does Not Nullify Or Limit The Application Of Section 302(c)(5) Of The LMRA

There is nothing in the statutory language or in the legislative history of ERISA, or in the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") which amended ERISA, to support Petitioners' proposition that Congress intended to limit the statutory requirements of section 302(c)(5) of the LMRA. Congressional intent to repeal the language of a statute "must be clear and manifest." *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)); *see also United States v. Fausto*, 484 U.S. 439, 453 (1988) ("a later statute will not be held to have implicitly repealed an earlier one unless there is clear repugnancy between the two. . . .").

Congress intended both ERISA and the LMRA to govern Taft-Hartley trust funds. The Senate Committee reporting on ERISA stated expressly that the LMRA would continue to apply to employee benefit plans. "[T]here are essentially three federal statutes which, although accomplishing different purposes and vested within different federal departments for enforcement, are all compatible in their regulatory responsibilities." S. Rep. No. 127, 93d Cong., 1st Sess. 4 (1973), *reprinted in* Legislative History of

the Employee Retirement Income Security Act of 1974, at 590 (1976). One of these federal statutes is the LMRA, which, as noted in the legislative history of ERISA, "provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union." *Id.*

In the face of congressional intent that the LMRA continue to govern trust funds, Petitioners and the Solicitor General point to the detailed provisions in Title IV of ERISA concerning transfers between pension plans to argue that Congress implicitly repealed the specific statutory requirements in LMRA section 302(c)(5). This argument is illogical, not supported by any statutory language or case law, and contrary to decisions by this Court.

Petitioners' argument is illogical because the provisions in Title IV of ERISA addressing transfers between multiemployer benefit plans apply only to pension plans. 29 U.S.C. § 1321. These provisions do not apply to welfare plans. The provisions do not contain any language repealing section 302(c)(5)'s requirements. Petitioners' argument, therefore, is that because ERISA has provisions dealing with transfers among pension plans, it overrides the application of section 302(c)(5) to both welfare and pension plans.

Petitioners' and the Solicitor General's argument is based on a misplaced reliance on the proposition that courts should not interpret an earlier statute broadly to circumvent the detailed remedial scheme found in a later statute. Pet. Brief p. 22; Solicitor Gen. Brief p. 20-21. Petitioners and the Solicitor General cite to this Court's reasoning in *International Bhd. of Teamsters v. Daniel*, 439 U.S. 551 (1979), in support of their proposition. The reasoning in *Daniel* in inapplicable to the case at bar.

Daniel involved a claim by an employee that a pension fund's alleged failure to advise him that he must have twenty years of continuous service to be eligible for pension benefits violated

the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 (the "Securities Acts"). 439 U.S. at 555. This Court dismissed the employee's claim, noting that the Securities Acts did not contain any statutory language including pension plans as securities, nor any legislative history indicating that Congress ever intended to subject pension plans to federal regulation as securities. 439 U.S. at 558, 563.

Unlike the Securities Acts in *Daniel*, Congress enacted section 302 specifically to regulate Taft-Hartley trust funds. Section 302(c)(5) establishes certain statutory requirements that must be met to permit employer contributions to Taft-Hartley trust funds. 29 U.S.C. § 186(c)(5); *see supra* p. 6. Section 302(e) expressly authorizes federal courts to restrain violations of these requirements. 29 U.S.C. § 186(e).

By asking this Court to ignore the plain language of section 302(c)(5) concerning Taft-Hartley trust funds in favor of ERISA's provisions dealing with transfers among pension plans, Petitioners and the Solicitor General essentially seek to have this Court decide which is the "better" statute.[19] When statutes overlap, courts "are not at liberty 'to infer any positive preference for one over the other.'" *Patterson v. McLean Credit Union,* 491 U.S. 164, 181 (1989) (citation omitted). This Court consistently has stated that when two statutes are "'capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.'" *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974) (*quoting Morton*, 417 U.S. at 551); *see also United States v. Fausto*, 484 U.S. 439, 461 n.9 (Stevens, J. dissenting). This Court has recognized that the LMRA and ERISA are capable of co-existence.

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[19] The Solicitor General, in fact, argues that ERISA is the better statute in this case to protect the Southern Employees because ERISA's general fiduciary duty "will allow trustees to make decisions that take into account the interests of *all* participants in the plan, whether they have departed or remained." Solicitor Gen. Brief p. 10-11 (emphasis in original).

See Amax Coal, 453 U.S. at 332, 334 & n.17 (Court noted that Congress intended both section 302(c)(5) and ERISA to impose fiduciary obligations on plan trustees, which responsibilities Congress "reaffirmed" with respect to multiemployer pension plans when it enacted MPPAA). The rule proposed by Respondents gives effect to the "sole and exclusive benefit" requirement of section 302(c)(5) in a manner consistent with ERISA's rules governing transfers between multiemployer pension plans.

B. The Second Circuit's Decision Does Not Violate Or Undermine ERISA

1. The Transfer Under Section 302(c)(5) Is Consistent With ERISA's Asset Transfer Rules

There is nothing in ERISA that prohibits Taft-Hartley trust funds from transferring assets between funds in situations when, as in the instant case, a transfer is necessary to remedy a violation of section 302(c)(5). Congress did not provide any specific guidelines in ERISA addressing the transfer of assets or liabilities between welfare plans. The rule proposed by Respondents does not conflict, even arguably, with any language or congressional intent in ERISA concerning transfers between welfare plans.

With respect to pension plans, Congress enacted several provisions as part of MPPAA that apply to mergers and transfers between multiemployer pension plans. 29 U.S.C. §§ 1411, 1414, 1415. Petitioners claim that these provisions permit a transfer between multiemployer pension plans only if both assets and liabilities are transferred, or only when there is a certified change in collective bargaining representative. Pet. Brief p. 29-31.

ERISA does not prohibit the transfer of assets without the transfer of liabilities. In sections 4231(b) and 4231(c) of ERISA, Congress expressly provides for the transfer of assets *or* liabilities

between multiemployer pension plans.[20] Thus, a transfer of surplus reserves among welfare and pension plans under section 302(c)(5) of the LMRA does not conflict with any provision in ERISA dealing with pension plans. Even assuming, *arguendo*, that there was a rule in ERISA mandating that assets may be transferred between pension plans only when liabilities are transferred, the transfer in the instant case would not conflict with such a rule because it involves only the transfer of surplus assets not tied to any liabilities.

Congress did not state anywhere in ERISA that a transfer between multiemployer pension plans may occur only if employees change their collective bargaining representative. Such a limitation cannot be read into ERISA's provisions on transfers between pension plans. In fact, ERISA's fiduciary standards require plan trustees to transfer assets and/or liabilities when such transfer would be in the best interests of the plan's participants. *See* 29 U.S.C. § 1104(a). *See also Vornado, Inc. v. Trustees of The Retail Store Employees' Union Local 1262*, 829 F.2d 416 (3d Cir. 1987); Solicitor Gen. Brief p. 24.

2. A Transfer Of Reserves Is Not A Benefit To The Southern Employers

Petitioners claim that the Second Circuit's decision violates ERISA and the Internal Revenue Code because it is "a transfer of

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[20] Transfers of assets or liabilities are permitted under section 4231(b) if (1) the plan sponsor notifies the Pension Benefit Guaranty Corporation of the planned transfer 120 days before the effective date; (2) the participants' or beneficiaries' accrued benefits are not lower immediately after the transfer; (3) the benefits are not subject to suspension; and (4) an actuarial valuation of the assets and liabilities of the affected plans have been performed within the year prior to the transfer. In this case the district court on remand may require compliance with these requirements before a transfer of reserves is effected.

assets for the benefit of the Southern Employers." Pet. Brief p. 32. Petitioners base this claim on the argument that, because the Southern Employers agreed to provide the same level of benefits to the Southern Employees, a transfer is not necessary to benefit the Southern Employees but will merely reduce the Southern Employers' obligation to contribute to the Southern Funds.

Petitioners' argument misses the mark. The Southern Employers agreed to provide the same level of benefits to the Southern Employees only for three years (JA 29). Upon the expiration of the 1984-87 collective bargaining agreements, the Southern Employers and Local 144 negotiated new agreements (JA 29). The district court found that under the new agreements, there was a restructuring of the Southern Funds and a decrease in welfare benefits to the Southern Employees (Pet. App. at 18a n.7). Moreover, the proper focus of this case is not the level of contributions that the Southern Employers agreed to make to the Southern Funds. The issue is whether the contributions made by the Southern Employers to the Greater Funds are being used for the benefit of the Southern Employees.

The Second Circuit's decision does not order the Greater Funds to transfer any assets or return any contributions to any Southern Employer, but to transfer a share of the pooled surplus reserves from the Greater Funds to the Southern Funds. Any transferred reserves would be transferred directly from the Greater Funds to the Southern Funds, and be held in trust by the Southern Funds in accordance with section 302(c)(5). The transferred reserves would not benefit any Southern Employer directly, or allow any Southern Employer to gain temporary use of trust fund assets. *See Holliday v. Xerox Corp.*, 732 F.2d 548, 550-51 (6th Cir.) (an employer's decision that has a primary purpose of benefiting employees but has the incidental effect of benefiting the employer as well does not violate ERISA prohibition against assets inuring to the benefit of an employer), *cert. denied*, 469 U.S. 917 (1984). If Petitioners' logic prevailed on this issue, any act that improves the financial condition of a Taft-Hartley trust fund would violate the proscription in ERISA against assets inuring to the benefit of employers. This would include the Greater Funds'

retention of the Southern Employees' share of the surplus reserves because it improves the financial condition of the Greater Funds.

Petitioners rely on two private letters rulings issued by the Internal Revenue Service ("IRS") to support their argument that the transfer of surplus reserves under section 302(c)(5) in this case is a transfer for the benefit of the Southern Employers in violation of the Internal Revenue Code. Both IRS rulings address situations involving a reversion of assets to contributing employers upon the termination of a defined benefit plan.[21] Because the Greater Funds are not terminating and no assets are reverting to the Southern Employers, these IRS rulings are inapposite.

The transfer of reserves here also is not a "return" of any contribution previously made by a Southern Employer to the

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[21] In one ruling, the IRS considered whether the excess assets of a terminated defined benefit plan, which may revert to the employers, constitute taxable income if the assets were transferred immediately to a defined contribution plan. Priv. Ltr. Rul. 89-48-032 (Sept. 6, 1989). The IRS determined that because the excess assets would be taxable if reverted to the employers, the excess assets also are taxable if a defined benefit plan was terminated and assets transferred to a defined contribution plan. The basis for the IRS' decision is that for tax purposes, upon termination of a defined benefit plan excess assets revert to the employer and then are contributed to a defined contribution plan. In the second IRS ruling cited by Petitioners, the IRS determined that an employer, which sponsored a defined benefit plan that it intended to terminate, could not use a distribution of the plan assets to satisfy its contractual obligations to a government agency arising in connection with its manufacturing and sale activity under various government contracts. Priv. Ltr. Rul. 91-36-017 (June 10, 1991). The IRS found that this would constitute, in effect, a reversion of assets to the employer because the employer would otherwise have to use its general corporate accounts to satisfy its liability.

Greater Funds. Indeed, as Petitioners admit, the Southern Employers have made no contention that they are entitled to, and the Second Circuit did not order, a return of contributions to the Southern Employers. Pet. Brief p. 33.

3. A Transfer Does Not Violate The Fiduciary Duties Of The Trustees Of The Greater Funds

Petitioners also claim that the transfer of reserves from the Greater Funds to the Southern Funds would constitute a diversion of assets to the Southern Employers and a disbursement of plan assets to the Southern Employees in violation of the trust documents of the Greater Funds. Pet. Brief p. 33. This argument is based entirely on the incorrect assumption that a transfer of a share of surplus reserves in the instant case is payment of assets from the Greater Funds directly to any Southern Employer or to any Southern Employee. The Greater Funds' trustees will not violate their fiduciary duties by transferring assets in this case.[22]

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[22] In fact, the Solicitor General takes the position that ERISA's fiduciary duties impose an obligation on the Greater Funds' trustees to consider a transfer of reserves in this case. Solicitor Gen. Brief p. 23. Such fiduciary duties, the Solicitor General argues, "limit the discretion of plan trustees to refuse to transfer assets when a group of participating employers and their employees break off to form a new plan." Solicitor Gen. Brief p. 23. Further, Petitioners do not dispute the fact that they would be required to transfer assets in cases in which employees transfer to a new fund because of a change in their collective bargaining representative. Pet. Brief p. 31.

CONCLUSION

Based on the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Second Circuit.

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No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners submit this reply to Respondents' brief in order to clarify certain points and to correct misleading statements.

1. Respondents contend that "[a] transfer in the instant case gives effect to the plain meaning of section 302(c)(5) in a manner consistent with ERISA." Brief for the Respondents ("Resp. Brief") at 8. That statement is patently false.

The transfer sought by Respondents does not meet the requirements of Section 4231 of ERISA, 29 U.S.C. § 1411. Brief for the Petitioners ("Pet. Brief") at 29. Further,

Section 408(b)(11) of ERISA, 29 U.S.C. § 1108(b)(11), provides that "a transfer of assets or liabilities between multiemployer plans determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231" shall not constitute a prohibited transaction. The necessary inference is that if a transfer does not meet the requirements of Section 4231 of ERISA, the transfer would violate Title I of ERISA, 29 U.S.C. §§ 1001-1168. *See* Pet. Brief at 28-35 for a fuller discussion of why the transfer sought by Respondents would violate ERISA.

Further, it is beyond any doubt that, under the circumstances of this case, ERISA does *not* require a transfer of assets from the Greater Funds to the Southern Funds. ERISA requires a transfer of assets only where (1) there is also a transfer of liabilities; and (2) there has been a certified change of the employees' bargaining representative. Pet. Brief at 31; Resp. Brief at 31. Neither of those two statutory conditions is satisfied here. If Respondents were correct in their contention that Section 302(c)(5), 29 U.S.C. § 186(c)(5), requires a transfer of assets in the present circumstances, ERISA § 4235, 29 U.S.C. § 1415, and other ERISA provisions would be rendered superfluous. Pet. Brief at 28-35.

2. According to Respondents, the phrase "jointly with" in Section 302(c)(5) "does not permit contributions of one employer to be used only for the benefit of the employees of other employers," Resp. Brief at 11, because "the contributing employer's employees [must] derive benefits from the contributions" in order to avoid a violation of Section 302(c)(5). Resp. Brief at 11, 12-13. Consequently, Respondents argue that the retention of those plan assets by the multiemployer plan from which the employer withdrew constitutes a violation of Section 302(c)(5).

The logic of Respondents' construction of the phrase "jointly with" leads to absurdity and is inconsistent with

other arguments made by Respondents. First, the parenthetical language in Section 302(c)(5) which includes the phrase "jointly with" reflects Congressional recognition and approval of the virtually universal practice of multiemployer plans to "pool" the contributions of all contributing employers—such that all assets of a multiemployer plan are available to pay to any participant the benefits to which he or she may be entitled under the terms of the plan. Respondents' and the Second Circuit's interpretation would attribute to Congress an intention to prohibit the Funds from using money previously contributed by a withdrawing employer, and indistinguishably pooled with other contributions, for the benefit of employees other than the employees of the withdrawing employer.

Multiemployer plans are vehicles for the sharing of risks, i.e., insurance arrangements. There is nothing unfair about some participants receiving less in benefit payouts than the amount contributed on their behalf. The expectation that some participants will not receive payouts is a factor that determines the amount of needed contributions. It is the nature of insurance that some will pay premiums and receive no payout so that others may receive payouts in excess of their premiums. Like other multiemployer plans, Petitioner Funds must pay benefits regardless of the amount of contributions received from the employer or former employer of the recipient of plan benefits. Affidavit of A. H. Higgs, Jr. ("Higgs Affidavit"), Joint Appendix ("J.A.") at 230-232; Affidavit of Dan M. McGill ("McGill Affidavit"), J.A. at 252.

Respondents' and the Second Circuit's reasoning is flawed in that it proves too much. Followed to its logical conclusion, their reasoning would require the benefit plan to disgorge a share of its reserves even when there is no new plan. Multiemployer benefit plans would be prohibited from using contributions of an employer who goes out of business to provide benefits for the employees of the

remaining employers. The attribution of such an intention to Congress is not supported by the legislative history and is contrary to the long-standing practices of multiemployer benefit plans. As noted in *Berkshire Hathaway, Inc. v. Textile Workers Pension Fund*, 874 F.2d 53, 55 n. 2 (1st Cir. 1989), "multiemployer pension plans are structured as 'pooled' funds, such that some employers, in effect, 'subsidize' the employees of other employers." *See also* Higgs Affidavit, J.A. at 231; McGill Affidavit, J.A. at 251-52; Brief *Amicus Curiae* of the Western Conference of Teamsters Pension Trust Fund in Support of Petitioners ("Western Conference of Teamsters *Amicus* Brief") at 7, Brief *Amicus Curiae* of the National Coordinating Committee for Multiemployer Plans in Support of Petitioners ("NCCMP *Amicus* Brief") at 9, and Brief *Amicus Curiae* of the Central States, Southeast and Southwest Areas Health and Pension Funds in Support of Petitioners ("Central States Teamsters *Amicus* Brief") at 9-11. Moreover, if the touchstone of the alleged violation is that the "surplus reserves" are not used for benefits for the employees on behalf of whom the contributions were made, the Petitioner Funds would be required to transfer plan assets whenever employees leave a plan, whether or not their employer withdraws from the Funds. *Cf.* Brief *Amicus Curiae* of the United States in Support of Petitioners ("United States *Amicus* Brief") at 15-16.

Not only does the reasoning of Respondents fail the test of logic, but also its premise is factually incorrect. The premise is that the so-called surplus reserves are never used for the benefit of the withdrawing employers' employees after an employer withdraws from the multiemployer plan. Even if we assume, for the sake of argument, that Section 302(c)(5) should be construed to require that the employees of a particular contributing employer must "derive benefit from the contributions," they do in fact derive such benefit. During the period that the Respondent employers were contributing to the

Petitioner Funds, their employees enjoyed coverage for health benefits under the Greater Welfare Fund and accrued benefit and vesting credit under the Greater Pension Fund. Western Conference of Teamsters *Amicus* Brief at 13-14. It is not questioned that the Respondent employees received all the benefits to which they were entitled under the terms of the Greater Funds. J.A. at 309, 347, 351, 355, 359, 365. After Respondent employers withdrew from Petitioner Funds, all of their employees who had attained vested benefits in the Greater Pension Fund retained their entitlement to benefits and their former employees who were in pay status continued to receive benefits. As of January 1, 1992, all participants of the Greater Pension Fund who were in pay status, including former employees of Respondent employers, received a 10% increase in their pension payments in recognition of the fact that inflation diminishes the value of fixed pension payments.[1]

3. Respondent employers deny that the transfer of assets they seek from Petitioners is a benefit to them. Resp. Brief at 33. They claim that the transfer is sought to enable their employees to derive benefit from Respondent employers' prior contributions to the Petitioner Funds. Yet, Respondent employers have produced no evidence that the value of the benefits provided to their employees by Petitioners was less than the value of their contributions to the Petitioner Funds. Indeed, nothing in the record negates the possibility that the value of benefits provided by Petitioner Funds to the employees of Respondent employers exceeded the value of the contribu-

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[1] This information is included pursuant to the obligation of counsel to advise the Court of new factual developments which may conceivably affect the outcome in a case before the Court. *Fusari v. Steinberg*, 419 U.S. 379, 390 (1975) (Chief Justice Burger, concurring). This increase in pension benefits can be verified by the official records of the Greater Pension Fund and will be reflected in its next annual report which, like other such reports, are available to the public at the U.S. Department of Labor.

tions made by the Respondent employers to the Petitioner Funds.

Respondent employers' denial that they would be the beneficiaries of the transfer rings hollow. The District Court specifically found that the transfer at issue here would be for the benefit of the Respondent employers. Appendix to the Petition for a Writ of Certiorari ("Cert. App.") at 20a-21a. The position of the Internal Revenue Service ("IRS") is that a transfer of assets like the one sought here would constitute taxable income to the Respondent employers. IRS Priv. Ltr. Rul. 89-48-032 (Sept. 6, 1989). *See also* IRS Priv. Ltr. Rul. 91-36-017 (June 10, 1991). Respondent employers conceded that their purpose in bringing this action was to diminish their obligation to contribute to the new Southern Funds. J.A. at 332-33, 341-42. In this connection it is noteworthy that Respondent employers themselves, and not the new Southern Funds, brought the present action, and those Funds are not parties in this litigation.

4. The Second Circuit and Respondents contend that their position is consistent with Title IV of ERISA, 29 U.S.C. §§ 1301-1461. Cert. App at 6a; Resp. Brief at 28-31. Respondents conveniently neglect to mention a fundamental and critical difference between their reading of Section 302(c)(5) and the provisions of Title IV of ERISA regarding transfers of assets. In situations where Respondents would interpret Section 302(c)(5) to *require* a transfer, Title IV would either *prohibit* the transfer or would make the transfer *discretionary* in the judgment of the transferor plan.[2] Pet. Brief at 28-36. Title IV prohibits a transfer of assets without a corresponding transfer of liabilities. Pet. Brief at 29-31. Furthermore, Section 4231 in Title IV of ERISA prohibits any transfer from one multiemployer plan to another in the absence of specified criteria, which have not been met in this case. *Id.* With the exception noted

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[2] The only exception is where there has been a certified change of collecitve bargaining representative. *See* Pet. Brief at 31.

in footnote 2, *supra*, Title IV "leaves the possibility of a transfer of liabilities, with a concomitant transfer of assets, to the discretion of the trustees [of the transferor plan]." *Vornado, Inc. v. Trustees of Retail Store Employees Union Local 1262*, 829 F.2d 416, 421 (3d Cir. 1987); United States *Amicus* Brief at 19.

5. Respondents assert repeatedly that the employees of the Respondent employers "transferred" from the Greater Funds to the Southern Funds. To the extent that "transfer" suggests that Respondent employees made a choice of their free will, no such "transfer" from the Greater Funds to the Southern Funds occurred. Respondent employers withdrew from the Greater Funds by ceasing to make contributions, thereby causing a cessation of benefit accruals under the Greater Pension Fund and ineligibility for benefits under the Greater Welfare Fund for those employees. Indeed, Respondent employees, through their collective bargaining representative, actively resisted the withdrawals. Pet. Brief at 3. Moreover, the new Southern Funds were not established until *after* the commencement of this lawsuit, Pet. Brief at 4; Resp. Brief at 5, which indicates that Respondents did not consider their employees' "transfer" to the Southern Fund a necessary element of their cause of action. Further mitigating against the common understanding of "transfer" is the fact that there was a 17-month interval between the withdrawal of Respondent employers from the Greater Pension Fund and the effective date of the Southern Pension Funds. Pet. Brief at 4 n.1.

6. Respondents repeatedly (i.e., 60 times) assert that this case involves "surplus" or "excess" reserves of the Greater Funds. That is simply not true.

"Surplus" or "excess" reserves or assets have not been the subject of the present case in either the Court of Appals or the District Court. Indeed, if "surplus" reserves were the touchstone on which Respondents' claim is based, it would have been a necessary allegation in their com-

plaint; it would have been a necessary element of their evidence; and it would have been the subject of necessary findings by the courts below. However, none of the foregoing occurred here. The Respondents did not allege a claim in their complaint in terms of "surplus" or "excess" reserves, and they did not present any evidence regarding the existence of such "surplus" or "excess" reserves. Consequently, neither of the courts below made any findings, or rendered their decisions, with reference to any "surplus." In fact, the term "surplus" does not even appear in the opinions of either of those courts. Finally, this Court did not grant review of an issue involving "surplus" or "excess" reserves. In any event, Section 302(c)(5) neither requires a transfer of assets with reference to all plan reserves nor does it require such a transfer with reference to "surplus" reserves.

7. Respondents claim that they "seek only the Southern Employees' proportionate share of the surplus reserves in the Greater Funds." Resp. Brief at 9 n.5. In addition to this claim falling outside the scope of the questions that this Court agreed to review, Respondents' new claim is wholly inconsistent with Respondents' position below. Respondents previously argued that:

> [I]n order to comply with Section 302(c)(5) the Greater New York Pension Fund must recognize that its assets are attributable, in corresponding amounts, to the *contributions made by each contributing employer.* Further, *the Greater New York Pension Fund must utilize those assets solely to benefit the employees of each particular contributing employer* . . . . Otherwise, the Greater New York Pension Fund would be employing those assets for the sole and exclusive benefit of individuals other than the employees on whose behalf the contributions were made.

Response (to Interrogatory No. 6) of Respondents/Plaintiffs to Petitioners'/Defendants' First Set of Interrogatories (emphasis added). J. A. at 305. Respondents made

the same assertion regarding the Greater Welfare Fund. J.A. at 306-07.

Under the Respondents' prior position, they claimed entitlement to a proportionate share of all of the reserves of the Petitioners Funds. In contrast, their new position would entitle Respondents to a share of the "surplus" assets of the Funds. The shifting of Respondents' position underlines the weakness of their prior position and their inability to defend the holding of the Court of Appeals.

8. The Second Circuit and Respondents assert that their position does not require a benefit plan to segregate the contributions of each contributing employer. Cert. App. at 10a; Resp. Brief at 12. Yet, the claim is made that the Greater Funds "must recognize . . . the contributions made by each contributing employer" and "must utilize those assets solely to benefit the employees of each particular contributing employer . . . ." J.A. at 305, 307. Even if the contributions of each contributing employer were not segregated, the holding of the Court of Appeals would require sufficient records to reconstruct the amount of contributions of an employer compared with the value of benefits provided to the employees of that employer. To impose such a system on multiemployer benefit plans would be their deathknell. The burden of keeping the necessary records alone would make many multiemployer benefit plans uneconomic. Uncontradicted expert testimony in the record is that:

> Many multiemployer plans include hundreds, even thousands of employers, and often employees obtain credits under the plan while working for a number of different employers. Individual accounting would be so inordinately expensive that, as a practical matter, many multiemployer plans could not exist if they were forced to undertake it.

McGill Affidavit, J.A. at 252. Because the gathering of such information is impractical, even the largest multi-

employer plans do not collect it. *See* Western Conference of Teamsters *Amicus* Brief at 21, 22 n.11. *See also Frank L. Ciminelli Construction Co. v. Buffalo Laborers Supplemental Unemployment Benefit Fund*, No. 92-7163, 1992 WL 251413, at *2 (2d Cir. Oct. 5, 1992).

The Second Circuit held:

> the only way that the Southern Employees could ever receive the "sole and exclusive benefit" of their employers' contributions to the Greater Funds on their behalf would be to mandate a reallocation of reserves from the Greater Funds to the Southern Funds.

Cert. App. at 11a.

Respondents argue that under that mandate, the Greater Funds should pay the Southern Funds "the average ratio of the Southern Employers' contributions to the total contributions to the [Greater Funds] as a percentage of the increase in the [Greater Funds'] surplus reserves during the time the Southern Employers contributed to the [Greater Funds]." Resp. Brief at 25-26. Apart from the fact that (1) Section 302(c)(5) does not require any payment, and (2) ERISA would bar any payment under the facts of this case, there are practical and logical difficulties with the position of Respondents and the Second Circuit.

First, the proposed rule would require the existence of records going back decades regarding (1) the amount of contributions made to a multiemployer benefit plan by each contributing employer, and (2) the amount of so-called "surplus reserves" the plan had over that entire period. Section 107 of ERISA, 29 U.S.C. § 1027, requires that plan records must be kept for only six years.

Second, Respondents' proposed rule would require an understanding of what "surplus reserves" means. That phrase is not a term of art used in ERISA or the Internal Revenue Code ("Code").[3] Nevertheless, Respondents offer

[3] The term "residual assets" is used in ERISA Section 4044(d), 29 U.S.C. § 1344, to refer to assets left over after payment of all

the following definition: "The amount of the trust fund's pooled assets in excess of its pooled liabilities are surplus reserves." Resp. Brief at 13. It is not at all clear how that definition of "surplus reserves" would be applied to an ongoing benefit plan. A plan's assets may increase to an amount exceeding liabilities without any new contributions causing it; for example, a plan's assets or reserves may increase or decrease as the stock market rises or falls. If the plan's fiduciaries decide that the plan should have a reasonable cushion over current liabilities in order to protect against the vagaries of the market, would the plan fiduciaries be putting the amount of the cushion at risk as "surplus reserves?" A welfare plan is typically funded on a pay-as-you-go basis. If a welfare plan has a reserve to cover any higher than projected costs, would that reserve be the "surplus reserves" of a plan? The valuation of liabilities for purposes of applying the Second Circuit's or the Respondents' formula is even more difficult. Changes in interest rates, whether one or more employees later become employed by a contributing employer and other variables can make large differences in the calculations of liabilities of plans.[4]

It is highly pertinent that Congress in enacting the existing system of withdrawal liability was not able to devise a practical system which compares a withdrawing employer's actual contributions to the actual liabilities left behind. Instead, Congress enacted as the presumptive method of calculating withdrawal liability, a formula which is intended to result in rough justice for the multiemployer plan over a period of time, even though particular employers may be required to pay amounts that may vary grossly from what a particularized com-

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plan liabilities upon termination of a single-employer pension plan. *See also* Code § 4980, 26 U.S.C. § 4980; ERISA § 404(d), 29 U.S.C. § 1104(d). The term "excess pension asset" was introduced in 1990 solely in connection with the transfer of pension assets to pay retiree health benefits. Code § 420, 26 U.S.C. § 420; ERISA §§ 101(d) and 408(b)(13), 29 U.S.C. §§ 1021(d), 1108(b)(13).

[4] *See* Western Conference of Teamsters *Amici* Brief at 20-24.

putation balancing actual contributions with benefits might yield.[5] ERISA § 4211(b), 29 U.S.C. § 1391(b). It would be equally difficult to measure the "allocation" ordered by the Court below; the development of any such complex program is clearly a legislative function, not one for the courts.

9. The Respondents' brief includes statements which are prejudicial and improper. Respondents' brief alleges wrongdoing in the administration of the Greater Funds. Resp. Brief at 4. Although these allegations were made in Respondents' original complaint, they were dropped from the subsequently amended, operative complaint. Had these allegations not been dropped from the Respondents' complaint, they would have been denied and appropriate evidence would have been presented. However, the allegations were not in issue, no evidence was presented, and no findings were made by the courts below. In these circumstances, for the Respondents to make these allegations in this Court as if they were facts is scandalous, and the statements should be stricken and disregarded.[6]

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[5] *See* NCCMP *Amicus* Brief at 11-14.

[6] Respondents complain that Petitioners' Statement of the Facts goes beyond the record (Resp. Brief at 4 n.3) in stating that "Like other health benefit plans, the Greater Welfare Fund has been struggling to maintain health benefit levels in the face of ever-rising costs. The Greater Pension Fund provides a modest maximum pension of $350 per month." It is respectfully submitted that the struggle of health benefit plans to maintain benefit levels in the face of ever-rising costs is so well known and notorious that judicial notice may be taken of the phenomenon. *Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 254 (1934). Further, the impact of this phenomenon on the Greater Welfare Fund is reflected in annual reports available to the public in the Public Document Room, U.S. Department of Labor. *Massachusetts v. Westcott*, 431 U.S. 322, 323 n.2 (1977). As to the statement that the Greater Pension Fund "provides a modest maximum pension," Resp. Brief at 4 n.3, the record shows a maximum pension of $350 per month (J.A. at 205) and it is respectfully submitted that it is reasonable to characterize such a pension as "modest." It is noted that an income at that level is below the poverty line. *Poverty in the United States*, U.S. Department of Commerce, Bureau of the Census (1991).

CONCLUSION

The best evidence of the error in the Second Circuit's interpretation of Section 302(c)(5) is the language of the statute itself. The words of the statute say nothing about transfers of assets from one multiemployer plan to another. *A fortiori*, the statute provides no basis for prescribing the particular circumstances wherein such a transfer is required to be made. Respondents argue that this Court should itself prescribe the conditions under which such a transfer of assets should be required. However, prescription of the law relating to the use of plan assets is a function for Congress. Congress did not address that subject in Section 302(c)(5), but did so in detail in ERISA.[7]

The decision below of the Second Circuit puts the continued existence of multiemployer benefit plans in jeopardy. The National Coordinating Committee for Multiemployer Plans, representing over 190 multiemployer plans, and three of the largest multiemployer plans in the United States, the Central States, Southeast and Southwest Areas Health and Welfare and Pension Funds and the Western Conference of Teamsters Pension Trust Fund provide attestation to that concern. Western Conference of Teamsters *Amicus* Brief, NCCMP *Amicus* Brief and Central States Teamsters *Amicus* Brief. That the Second Circuit has misconstrued Section 302 of the LMRA, a criminal statute, has been demonstrated and attested to by the United States, on behalf of the De-

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[7] In *Guidry v. Sheet Metal Workers National Pension Fund*, 493 U.S. 365, 375 (1990), this Court was faced with the question whether a general provision in the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 501(c), may override ERISA's prohibition on the alienation of pension benefits. This Court held that ERISA prevailed (at least in part) on the basis of the "elementary tenet of statutory construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one. . . .'" (quoting *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)).

partment of Labor and the Pension Benefit Guaranty Corporation, *see* United States *Amicus* Brief, as well as by the amici named above.

Moreover, the Second Circuit's holding that Section 302 mandates "a reallocation" of the assets of Petitioner Funds is inconsistent with this Court's conclusion in *United Mine Workers v. Robinson*, 455 U.S. 562, 572 (1982), that Section 302 does not place "any restriction on the allocation of the funds among the persons protected." For all of the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. 186(c)(5), requires the trustees of multiemployer benefit plans to transfer part of the plans' reserves to new multiemployer funds set up by employers who leave the plans.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Department of Labor and the Pension Benefit Guaranty Corporation (PBGC) each have an interest in this case because it involves the duties of trustees of multiemployer benefit plans subject to the Labor-Management Relations Act of 1947 (LMRA) and the Employee Retirement Income Security Act of 1974 (ERISA). The Secretary of Labor (the Secretary) has significant enforcement responsibilities under Title I of ERISA. The PBGC, a wholly owned United States government corporation, is responsible for administering and enforcing Title IV of ERISA, including the Multiemployer Pension

Plan Amendments Act of 1980 (MPPAA). As we explained in our brief filed at the petition stage at the Court's invitation, the question whether Section 302(c)(5) of the LMRA requires a multiemployer fund to transfer assets to a new multiemployer fund established by withdrawing employers and their employees' collective bargaining representative is an important question with significant ramifications for the administration of multiemployer plans.

STATEMENT

1. Concern about the "corruption of collective bargaining through bribery of employee representatives by employers" and related evils led Congress to enact Section 302 of the LMRA, 29 U.S.C. 186. *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959). That provision generally prohibits the transfer of money from employers to union officials.[1] Transfers of money in violation of Section 302 are criminal offenses, 29 U.S.C. 186(d), and federal courts have jurisdiction to restrain such violations, 29 U.S.C. 186(e).

Subsection (c) of Section 302 sets forth several exceptions to these broad prohibitions. The exception pertinent to this case allows employers to pay money "to a trust fund established by [the employees'] representative." Section 302(c)(5), 29 U.S.C. 186(c)(5). This ameliorative provision protects employees by imposing a number of requirements on the operation of such funds. Section 302(c)(5) re-

[1] The statute provides in relevant part: "It shall be unlawful for any employer * * * to pay, lend, or deliver * * * any money or other thing of value * * * to any representative of any of his employees." Section 302(a)(1), 29 U.S.C. 186(a)(1).

quires that the fund be established as a trust pursuant to a written agreement; that employers and employees be represented equally in administration of the fund; and that pension funds be kept separate from other funds. See 29 U.S.C. 186(c)(5)(A)-(C). This case involves Section 302(c)(5)'s additional requirement that the funds be used "for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents)."

2. Petitioners are multiemployer pension and welfare benefit funds (the Greater Funds)[2] and their trustees. The Greater Funds were established pursuant to a collective bargaining agreement between a multiemployer bargaining association, Greater New York Health Care Facilities Association, Inc. (the Greater Association), and Local 144 of the Hotel, Hospital, Nursing Home and Allied Services Employees Union (the union). Respondents include a group of employers (the Southern employers), management companies, and employees (the Southern employees) that broke away from the Greater Association, and eventually established new multiemployer pension and welfare funds through collective bargaining with the union. Pet. App. 2a-3a, 14a.

In 1981, the Southern employers left the Greater Association to form Southern New York Residential Health Care Facilities, Inc., a separate multiem-

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[2] The Greater Funds are the Local 144 Nursing Home Pension Fund (Greater Pension Fund) and the New York City Nursing Home-Local 144 Welfare Fund. Pet. App. 13a.

ployer bargaining association. At that time, the Southern employers negotiated individual agreements with the union under which they continued to contribute to the Greater Funds on behalf of their employees. Pet. App. 3a, 13a-14a. In 1984, however, the Southern employers negotiated agreements with the union establishing new funds (the Southern Funds) for their employees. *Id.* at 3a, 14a-15a.[3] The 1984 collective bargaining agreements between the Southern employers and the union provided that "[n]o employee shall lose benefits as a result of transfer of his/her coverage" from the Greater Funds. *Id.* at 15a. The agreements also required the Southern employers to provide the same level of benefits that the Greater Funds provided. *Id.* at 3a. The agreements did not provide for a transfer of assets from the Greater Funds, but stated that the Southern employers could sue to compel a transfer and that the union would "not oppose such a suit provided that the suit was consistent with applicable law." *Ibid.* (internal quotation marks omitted).

Trust agreements were executed in October 1985, and the Southern Funds' trustees agreed that the Funds would become operational on December 1, 1985. Pet. App. 4a. With respect to employees whose rights under the Greater Pension Fund had not vested at the time of the withdrawal, the trustees agreed that the Southern Pension Fund would give credit for years of service in employment covered by the Greater Pension Fund. Accordingly, an employee with, say,

[3] The newly established funds are the Local 144 Southern New York Residential Health Care Facilities Association Pension Fund (Southern Pension Fund) and the Local 144 Southern New York Residential Health Care Facilities Association Welfare Fund. Pet. App. 13a.

nine years of credited service under the Greater Pension Fund would satisfy the ten-year vesting requirement of the Southern Pension Fund after one year of additional service. With respect to employees whose benefits with the Greater Pension Fund already had vested at the time of the withdrawal, the Southern Pension Fund agreed to supplement the amount due from the Greater Pension Fund so that the total amount received would equal the total amount the employee would have received if his employer had not left the Greater Association.[4] Thus, the Greater Pension Fund remained fully liable for all vested liabilities incurred as of the date of withdrawal. *Id.* at 3a-4a, 16a.

3. To help finance the Southern Funds, respondents sought to have petitioners transfer a portion of the assets of the Greater Funds to the Southern Funds. When petitioners refused, respondents commenced this action in the United States District Court for the Southern District of New York, arguing, among other things, that the trustees of the Greater Funds had violated the "sole and exclusive benefit" provision of Section 302(c)(5) and breached their fiduciary duties under ERISA by refusing to transfer a portion of the Greater Funds' assets to the Southern Funds. Pet. App. 16a-17a.

The district court ruled in favor of the Greater Funds on both grounds. Pet. App. 13a-29a. The court concluded that Section 302(c)(5) imposes a duty to transfer assets only when necessary to facilitate the right of employees to change their collective bargain-

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[4] For example, "an employee retiring with twenty five years of combined service, with eight years under the Southern Pension Fund, would receive eight/twenty-fifths of his total benefit from the Southern Pension Fund." Pet. App. 16a n.5; see *id.* at 4a.

ing representative. Because the same union represented the Southern employees both before and after the withdrawal, the trustees were not required to transfer the funds under that construction of the LMRA. Pet. App. 19a-21a.[5]

The district court also rejected the Southern Funds' contention that they "have assumed the liabilities of the Greater Funds and * * * the assets attributable to those liabilities must follow those liabilities." Pet. App. 24a. The court concluded that "there has been no transfer of liabilities from the Greater Funds to the Southern Funds," and explained: "It is true that the Southern Pension Fund does recognize past years of service for those employees who had not vested under the Greater Pension Fund, but that was a decision made by the Southern Fund trustees after establishment of those funds." *Ibid.*

The district court further noted that in 1980 Congress amended ERISA-by adopting MPPAA, "a comprehensive statute regulating employer withdrawal from pension plans." Pet. App. 25a. Under MPPAA, however, a transfer of assets and liabilities is mandated only when an employer withdraws "as a result of a certified change of collective bargaining representative." 29 U.S.C. 1415. Moreover, while MPPAA bars plans from adopting asset transfer rules that

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[5] The court stated that the transfer sought in this case would redound to the benefit of the employers, not the employees, because it would reduce the employers' obligation to contribute to the new Southern Funds they had chosen to create. In the court's words, "[i]t would indeed be anomalous to permit an employer to willingly assume obligations for its own purposes and then to use the financial pressures of that choice to force a transfer of assets from the plan from which it has chosen to withdraw." Pet. App. 21a.

"unreasonably restrict the transfer of assets in connection with the transfer of liabilities," 29 U.S.C. 1414, the court concluded that "this section would be relevant to this case only if there had been a transfer of liabilities." Pet. App. 27a. The court went on to hold that the trustees of the Greater Funds had breached no duty under ERISA. *Id.* at 28a.

4. The court of appeals, speaking through Judge Pratt, reversed. Pet. App. 1a-12a. The court first rejected petitioners' argument that ERISA governed this matter to the exclusion of the LMRA, stating that the plans at issue were "governed *jointly* by the LMRA and ERISA." *Id.* at 6a. The court emphasized that Section 302(c)(5)'s "sole and exclusive benefit" requirement is a statutory recognition that employer payments to a trust fund are in exchange for employees' labor and thus should benefit the employees on whose behalf they were made. Pet. App. 8a-9a. The court concluded that Section 302(c)(5) therefore imposes a tight link between the use of funds in a multiemployer benefit plan and the employees on whose behalf the funds were contributed. The court reasoned that "[i]t is only just, said Congress, that the employe [*sic*] whose hour's work required the employer to make a payment of five cents to the trust fund be assured of reaping the benefit of that payment." *Id.* at 9a. The court further concluded that a failure to require the transfer of reserves to the Southern Funds "would operate as a windfall to the Greater Funds." *Ibid.*

The court rejected petitioners' reliance on the language of Section 302(c)(5), which permits a fund's assets to be used not only for the benefit of the employees on whose behalf the contributions were made, but also for the benefit of "employees of other em-

ployers" who contributed to the same fund. Pet. App. 10a-11a. The court acknowledged that Section 302(c)(5) does not require multiemployer funds to tie the benefits of employee-participants to contributions made on their individual behalf. Pet. App. 10a. In the court's view, however, Section 302(c)(5) nonetheless requires a transfer whenever "there is no chance, actuarial or otherwise, that any of the 'employees of [the departing] employer' [other than employees whose benefits already had vested] will ever receive benefits based on their contributions." *Id.* at 11a. The court concluded that "the only way that Southern Employees could ever receive the 'sole and exclusive benefit' of their employers' contributions to the Greater Funds * * * would be to mandate a reallocation of reserves from the Greater Funds to the Southern Funds." *Ibid.*

The court remanded the case to the district court to determine what portion of the reserves of the Greater Funds should be reallocated to the Southern Funds, stating that in fashioning a transfer order the district court should be guided by the principle that "a fair portion of the reserves reflecting contributions made to the Greater Funds on behalf of the Southern Employees should be reallocated to the Southern Funds where the Southern Funds have undertaken the responsibility to pay the benefits for which the contributions were made." Pet. App. 12a.

Because the court ruled that the transfer was required by Section 302(c)(5) of the LMRA, it did not reach respondents' claim that the fiduciary duties imposed by ERISA also obligated petitioners to transfer a portion of the assets of the Greater Funds. Pet. App. 12a.

SUMMARY OF ARGUMENT

1. Section 302(c)(5) imposes a simple limitation on the use of funds contributed to employee benefit plans: they must be used "for the sole and exclusive benefit" of two classes of people: (a) "the employees of [the] employer [who contributed the funds], and their families and dependents"; and (b) "the employees of other employers making similar payments, and their families and dependents." The court of appeals' holding—that Section 302(c)(5) prohibits the use of funds for the benefit of "the employees of other employers making similar payments"—cannot be reconciled with the language of the statute.

That holding also is inconsistent with the basic structure of multiemployer plans. The fundamental concept on which such plans rest is that a group of employers contribute funds, which jointly are to be used for the benefit of the employees of all employers in the group. This concept is undermined by allowing a new plan established for the benefit of the employees of a single employer or group of employers to reclaim funds when they leave the plan.

The principal basis the court of appeals offered to justify its holding was the view that a contrary rule would penalize departing employees unfairly, by depriving them of the benefit of contributions made to the plan on their behalf. But this argument proves too much. The court of appeals itself acknowledged that trustees are not required to transfer funds whenever employees leave a plan. That being the case, the only rule consistent with Section 302(c)(5) is one allowing the funds to be used for the remaining employees.

2. In its haste to do equity, as it saw it, the court of appeals brushed past Congress's detailed regula-

tion of asset transfers between multiemployer pension plans. MPPAA provides specific rules governing withdrawal from multiemployer plans, describes employers' liability to the plans when they leave, and imposes an obligation on plan trustees to transfer funds to a new plan set up by departing employers in a single, narrowly defined circumstance not present in this case. It is highly unlikely that Congress would have imposed such a narrowly defined obligation if the LMRA already created a broad rule requiring a transfer.

Similarly, the Second Circuit's decision rests on the assumption that the economic relations between a pension plan and departing employers necessarily depend on the amount of contributions and liabilities attributable to the employees of the departing employers. This approach is in tension with 29 U.S.C. 1391. That provision allows trustees to choose from several methods for calculating withdrawal liability; only one of these methods is based on the amount of liabilities attributable to employees of the departing employer. The court of appeals' approach also creates a perverse incentive by making withdrawal from multiemployer plans more attractive, even though Congress intended, through MPPAA, to make withdrawal less attractive.

Finally, reversal of the Second Circuit's ill-conceived decision would not leave employees unprotected. ERISA requires trustees to comply with strict fiduciary standards in all aspects of their administration of the plan, including their determination whether to transfer plan assets to a new plan set up by departing employers. Consideration of cases like this under ERISA's general fiduciary duty—as opposed to the simplistic per se rule the court of appeals derived from the LMRA—will allow trustees to make

decisions that take into account the interests of *all* participants in the plan, whether they have departed or remained.

ARGUMENT

SECTION 302(c)(5) OF THE LMRA DOES NOT REQUIRE A TRANSFER OF PLAN ASSETS FROM A MULTIEMPLOYER BENEFIT PLAN WHENEVER AN EMPLOYER WITHDRAWS AND ESTABLISHES A NEW PLAN

A. The Asset Transfer Rule Adopted By The Court Of Appeals Is Not Supported By The Language Or Purpose Of Section 302(c)(5)

The court of appeals erred by concluding that Section 302(c)(5) of the LMRA establishes a per se rule that the trustees of a multiemployer plan must transfer assets any time an employer withdraws and sets up a new multiemployer plan. The fundamental premise on which that conclusion rests is that trustees who fail to hand over funds to a new multiemployer plan set up by withdrawing employers violate the LMRA by refusing to use the funds entrusted to them for the "sole and exclusive benefit" of the employees on whose behalf the funds were contributed. See Pet. App. 10a-11a.

The court of appeals' premise cannot be reconciled with the language of Section 302(c)(5) itself. That provision permits the use of such funds not only for the "sole and exclusive benefit of the employees of [the] employer" that contributed them, but also for the benefit of "the employees of other employers making similar payments." [6] Thus, Section 302

[6] Section 302(c)(5) authorizes payments by an employer of:

> money or other thing of value * * * to a trust fund established by [an employee] representative, for the sole and

(c)(5) does not require trustees of multiemployer funds to segregate payments made by each employer and to use such payments solely for the benefit of the employees of the contributing employer; to the contrary, the statute permits trustees administering multiemployer plans to pool employer contributions for the purpose of paying benefits to *all* participants in the plan. The only requirement established by the provision at issue is that the trustees must use the funds for "the benefit of employees and their families and dependents, to the exclusion of all others." *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 570 (1982) (rejecting a claim that Section 302(c)(5) requires eligibility rules embodied in a collective bargaining agreement to be reasonable); see *id.* at 572 ("None of the conditions [specified in Section 302(c)(5)] places any restriction on the allocation of the funds among the persons protected by § 302(c)(5)."); *Stinson* v. *Ironworkers District Council Benefit Trust*, 869 F.2d 1014, 1022 (7th Cir. 1989).

The court of appeals' view that the LMRA grants employees a right to trace and claim the contributions of their particular employers is at odds not only with the language of the statute, but with the basic structure of multiemployer plans. Once contributions enter such plans, the funds are tied neither to the individual employees on whose behalf the contributions were made, nor to the workforce of the employer that made the contributions. For example,

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exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents *jointly with the employees of other employers making similar payments, and their families and dependents*) [emphasis added].

contributions made "on behalf of" an employee who leaves a pension plan before serving long enough for his pension to vest will never benefit that employee in any way (unless he subsequently returns to the plan). Those contributions, pooled with all other contributions made on behalf of all other employees, instead will be used to defray the costs of benefits paid to other participants in the plan, including the employees of other employers.[7] Similarly, an employee's right to receive vested benefits continues even if his employer withdraws from the plan or otherwise ceases making payments.[8]

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[7] See *British Motor Car Distributors, Ltd.* v. *San Francisco Automotive Industries Welfare Fund*, 882 F.2d 371, 378 (9th Cir. 1989); *Stinson*, 869 F.2d at 1022; *Local Union No. 5* v. *Mahoning and Trumbull County Building Trades Welfare Fund*, 541 F.2d 636, 639 (6th Cir. 1976) ("That the [fund's] rule results in certain employers' contributions being used for other than their employees does not violate the 'sole and exclusive benefit' requirement. Such imprecision is part and parcel of a pooled fund specifically authorized through 29 U.S.C. § 186(c)(5)." (citations omitted)); cf. 26 U.S.C. 413(b)(3) (in determining whether a multiemployer benefit plan meets the "exclusive benefit" requirement of Section 401 of the Internal Revenue Code, all plan participants shall be considered to be employees of the contributing employer); 26 C.F.R. 1.413-1(d) (regulation implementing Section 413 (b)(3)).

[8] See *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 472 U.S. 559, 567 n.7, 579 n.20 (1985); H.R. Rep. No. 869, 96th Cong., 2d Sess. Pt. 1, at 53 (1980) (multiemployer pension plans are preferable because they "enabl[e] a plan participant to retain benefit credits earned * * * even though the employer subsequently ceases contributing to the plan[, so that other employers] have the burden of funding the unfunded benefit obligations for employees of a withdrawn employer").

In addition, the court of appeals' interpretation of Section 302(c)(5) stretches the language of the statute to further a purpose far afield from that at which Section 302 is directed. As this Court has explained, the legislative history of the provision shows that "[t]hose members of Congress who supported [Section 302's general prohibition on employer payments to employee representatives] were concerned with corruption of collective bargaining through bribery of employee representatives by employers, with extortion by employee representatives, and with the possible abuse by union officers of the power which they might achieve if welfare funds were left to their sole control." *Arroyo* v. *United States*, 359 U.S. 419, 425-426 (1959) (footnotes omitted); see *Robinson*, 455 U.S. at 572 (noting Congress's concern "that pension funds administered entirely by union leadership might serve as 'war chests' to support union programs or political factions, or might become vehicles through which 'racketeers' accepted bribes or extorted money from employers"); *Walsh* v. *Schlecht*, 429 U.S. 401, 410-411 (1977); *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 474 (1960) (Frankfurter, J., dissenting). Congress responded to that concern in Section 302(c)(5) by enumerating specific standards "to assure that welfare funds would be established only for purposes which Congress considered proper and expended only for the purposes for which they were established." *Arroyo*, 359 U.S. at 426; see *Robinson*, 455 U.S. at 572 (noting that "[e]ach of the specific conditions [in Section 302(c)(5)] is consistent with the nondiversion purpose"). Because the conduct at issue in this case poses no risk that assets will be diverted from participants in the plan, let alone to the benefit

of union officials, the purpose of the statute does not support the Second Circuit's broad interpretation of the language of Section 302(c)(5).

The court of appeals' error is made particularly clear by the court's unwillingness to pursue its rationale to its logical conclusion. The court recognized the well-established rule that trustees are not required to transfer funds to a new plan whenever employees leave a plan. See, *e.g.*, *O'Hare* v. *General Marine Transport Corp.*, 740 F.2d 160, 173 (2d Cir. 1984) ("To claim that monies retained by the Funds contributed by an employer on behalf of all of its employees is not contributed 'for the sole and exclusive benefit of the employees of such employer' whenever some of the employees choose to leave the union and [the] fund would be an unfair and unrealistic construction of section 302(c)(5)."), cert. denied, 469 U.S. 1212 (1985). The court of appeals distinguished *O'Hare* as limited to situations in which "*some*, but not all, of an employer's employees" changed plans. Pet. App. 10a. By contrast, the court stated, judicial intervention is required when the employer leaves with all of its employees, because "there is no chance, actuarial or otherwise, that any of the 'employees of such employer' will ever receive benefits based on their contributions." *Id.* at 11a. But if the reason for judicial intervention is, as the court of appeals held, that Section 302(c)(5) is violated when "employees [do not] enjoy the 'sole and exclusive benefit' of their efforts," Pet. App. 9a, then there is no justification for the distinction articulated by the court of appeals. At bottom, if the statute requires contributions to be expended for the "sole and exclusive benefit" of the employees on whose behalf the contributions were made, trustees would be required to

transfer funds whenever employees leave a plan, whether or not their employer leaves the plan as well. The obvious inconsistency of that result with the nature of multiemployer plans demonstrates that the court of appeals' underlying premise is incorrect as well.[9]

B. Congress's Regulation Of Asset Transfers And Employer Withdrawals In ERISA Supports The Conclusion That The LMRA Does Not Mandate This Asset Transfer

This Court should be "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134, 147 (1985). In holding that Section 302(c)(5) of the LMRA implicitly imposes a categorical rule governing the transfer of assets between multiemployer plans, the court of appeals failed to recognize that Congress comprehensively regulated the topic in ERISA. In particular, Title IV of ERISA contains specific provisions governing transfers of assets of

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[9] In any event, it is clear on the facts of this case that many of the Southern employees will continue to receive benefits from the Greater Funds. First, as the court of appeals noted (Pet. App. 4a, 11a), those Southern employees whose pension rights vested before the withdrawal will receive pension benefits from the Greater Pension Fund. Also, the Greater Pension Fund may be obligated to pay benefits to Southern employees whose benefits had not vested at the time of withdrawal if those employees subsequently go to work for an employer that contributes to the Greater Pension Fund and thereafter vest on the basis of all service under the Greater Pension ~~Fund,~~ including the time they worked for Southern employers before the withdrawal. See 29 U.S.C. 1053(b)(3), 1054(e).

multiemployer pension plans. 29 U.S.C. 1411-1415; see also 29 C.F.R. Pt. 2672 (PBGC's regulations implementing 29 U.S.C. 1411).[10] In addition, Title I of ERISA imposes a general fiduciary duty on welfare and pension plan trustees that obligates them to consider asset transfer requests in good faith. 29 U.S.C. 1104.

1. MPPAA casts doubt on the decision of the court of appeals in two ways. First, MPPAA's express requirement that trustees transfer pension plan assets in certain narrowly defined circumstances would be largely superfluous if the court of appeals were correct in concluding that the LMRA generally requires asset transfers whenever employers withdraw and establish new plans. Second, the decision of the court of appeals is in tension with MPPAA's general structure and purpose, because the decision makes withdrawal from multiemployer plans more attractive.

a. Part 2 of Subtitle E of Title IV of ERISA ("Merger or Transfer of Plan Assets or Liabilities"),

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[10] As the name suggests, the Multiemployer Pension Plan Amendments Act of 1980, in which Sections 1411-1415 were enacted, applies only to pension plans, not welfare plans. See *Trustees of Local 546 Health & Welfare Fund* v. *Lith-O-Kraft Plate Co.*, 692 F. Supp. 782 (N.D. Ohio 1988) (MPPAA does not apply to welfare plans); accord Pet. App. 25a n.16; see also MPPAA, Pub. L. No. 96-364, § 1, 94 Stat. 1208 (setting out official title of MPPAA). Congress's omission of similar requirements for welfare plans is consistent with its decision to subject welfare plans to considerably less stringent regulation under ERISA than pension plans. See 29 U.S.C. 1051(1) (exempting employee welfare benefit plans from minimum participation and vesting requirements); 29 U.S.C. 1081(1) (exempting employee welfare benefit plans from funding requirements).

which was added by MPPAA, expressly addresses the obligation of trustees to transfer assets in connection with the withdrawal of an employer from a multiemployer pension plan. First, Section 1411(a) prohibits any transfer of assets between multiemployer pension plans except in accordance with the procedures set forth in Section 1411(b).[11] Subsection (b), in turn, requires notice to the PBGC at least 120 days before the proposed transfer, Section 1411(b)(1), and imposes a number of additional restrictions designed to prevent certain transfers that may harm participants, Section 1411(b)(2)-(4).[12] In our view, the court of appeals should not have ordered petitioners to transfer assets between pension plans without considering whether the transfer satisfied the requirements of Section 1411(b).[13]

Second, Title IV of ERISA mandates the transfer of assets between multiemployer pension plans in one

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[11] "[A] plan sponsor may not cause a multiemployer plan to * * * engage in a transfer of assets and liabilities to or from another multiemployer plan, unless such * * * transfer satisfies the requirements of subsection (b) of this section." 29 U.S.C. 1411(a).

[12] Section 1411(b)(2) provides that no participant's accrued benefit may be lower immediately after the transfer than it was immediately before the transfer. Section 1411(b)(3) provides that a transfer may not occur unless benefits are not expected to be suspended. Section 1411(b)(4) requires a recent actuarial valuation of the affected plans.

[13] Petitioners did not argue to the court of appeals that the transfer requested by respondents would have violated Section 1411. Nevertheless, the court of appeals should have required that the statutory notice to PBGC be given before consummation of any transfer and should have examined whether the other requirements of the Section had been met.

circumstance only: when an employer has withdrawn from a multiemployer pension plan as a result of a certified change of collective bargaining representative and the covered employees will be participants in another multiemployer pension plan. In such circumstances, Section 1415 requires multiemployer pension plans to transfer certain assets *and* liabilities to the new multiemployer plan. Because in this case the same union continued to represent the affected employees after the Southern Employers' withdrawal, Section 1415 did not require a transfer.

Third, Section 1414(a) addresses asset transfers indirectly, by providing that any rules a plan adopts to govern transfers must "not unreasonably restrict the transfer of plan assets in connection with the transfer of plan liabilities." That provision imposes no obligation to transfer either assets or liabilities; it merely mandates that if a plan decides to transfer liabilities, any related transfer of assets must comply with uniformly applied plan rules that do not unreasonably restrict the transfer of assets in connection with the transfer of liabilities. Accordingly, because no liabilities were transferred from the Greater Pension Fund to the Southern Pension Fund, Section 1414(a) has no application to this case. See *Vornado, Inc.* v. *Trustees of Retail Store Employees' Union Local 1262*, 829 F.2d 416, 419-421 (3d Cir. 1987).[14]

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[14] In explaining how reallocation should be fashioned on remand, the court of appeals stated that reserves should be transferred from the Greater Funds in proportion to the "liabilities now undertaken by the Southern Funds." Pet. App. 11a. The court of appeals apparently was referring to the Southern Pension Fund's unilateral decision to give non-vested employees credit for the time their employers

In light of these detailed provisions regarding transfers of assets, it would be anomalous to interpret Section 302(c)(5), which does not mention asset transfers, to impose the categorical rule adopted by the court of appeals. Moreover, in language similar to that of Section 302(c)(5), ERISA since its enactment has required that the assets of employee benefit plans "be held for the exclusive purposes of providing benefits to participants in the plan." 29 U.S.C. 1103(c)(1). Yet Congress plainly did not view that provision as imposing a categorical transfer requirement because it added Section 1415(a) to the statute in 1980, which specifies a single circumstance when such a transfer of assets between multiemployer pension plans is required. Hence, the interpretation of the court of appeals renders Section 1415(a) largely superfluous.[15] And the detailed provisions of Title IV

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contributed to the Greater Funds on their behalf. But as the district court explained, "an assumption of liability for * * * past service credit * * * is not the same as a transfer of liabilities from the Greater Funds to [the Southern Funds], since the latter implies that the Greater Funds had a preexisting obligation to those who left the plan, which is simply not the case here." *Id.* at 24a. The PBGC's regulations define "transfer of assets or liabilities" between pension plans as "a diminution of assets or liabilities with respect to one plan and the acquisition of these assets or the assumption of these liabilities by another plan or plans." 29 C.F.R. 2670.3. Because the Greater Pension Fund in fact retained all the Southern employees' pension liabilities that had accrued at the time of withdrawal, there was no "transfer" of liabilities in this case.

[15] The court's interpretation may not render Section 1415(a) entirely superfluous because that provision requires the transfer of assets and liabilities even when there has been only a partial withdrawal from a multiemployer plan

of ERISA deeply undercut the court of appeals' conclusion that the LMRA's spare language broadly requires transfers of assets whenever employers leave multiemployer plans. Compare *International Brotherhood of Teamsters* v. *Daniel*, 439 U.S. 551, 569-570 (1979) ("[t]he existence of * * * comprehensive legislation [in ERISA] governing the use and terms of employee pension plans severely undercuts all arguments for extending the Securities Act to noncontributory, compulsory pension plans," particularly where "Congress believed that it was filling a regulatory void when it enacted ERISA").[16]

b. Moreover, by granting employers a ready means to fund new plans, the court of appeals has not only

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resulting from a change of a collective bargaining representative. Such a withdrawal can occur, for example, if "the employer permanently ceases to have an obligation to contribute under one or more but fewer than all collective bargaining agreements under which the employer has been obligated to contribute under the plan." 29 U.S.C. 1385 (b)(2)(A)(i). It is possible, in light of the court of appeals' distinction of earlier precedent that did not require a transfer when only some of an employer's employees left the plan, that the court of appeals would not require a transfer under circumstances where a transfer would be required by Section 1415(a). But such a distinction would undermine the purported basis for the court's holding in this case, because the funds nevertheless would not be used for the benefit of the employees on whose behalf they were contributed.

[16] See also *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 181 (1989) ("We should be reluctant * * * to read an earlier statute broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute."); *United States* v. *Fausto*, 484 U.S. 439, 453 (1988) (the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.").

obviated the need for Section 1415(a), it positively has undermined the policies of MPPAA by making withdrawal from multiemployer plans substantially more attractive. A central theme of MPPAA was to protect plans from the adverse consequences of employer withdrawal and to reduce the incentives for such withdrawals. See *Pension Benefit Guaranty Corporation* v. *R.A. Gray & Co.*, 467 U.S. 717, 721-722, 130 (1984); H.R. Rep. No. 869, 96th Cong., 2d Sess. Pt. 1, at 67-68 (1980) ("The purpose [of MPPAA] is * * * to eliminate the incentive to pull out of a plan."). Accordingly, Congress established special rules governing liability for withdrawals from multiemployer pension plans, which were designed to ensure that employers who withdraw pay their share of the plan's unfunded vested benefits. 29 U.S.C. 1381. The court of appeals has inverted this principle by creating a blanket rule based in the LMRA that imposes liability on the *plan* in connection with employer withdrawals.

In addition, the rules Congress has established to govern withdrawal liability all recognize that multiemployer plans involve the pooling of liabilities. See 29 U.S.C. 1391(b), 1391(c)(2), 1391(c)(3), 1391(c)(4). Three of the four methods from which trustees may choose do not tie a withdrawing employer's liabilities to the unfunded pension benefits attributable to its employees at all; the fourth method (the "direct attribution method")—which is said to be "completely impracticable" for "most multiemployer plans," D. McGill & D. Grubbs, Jr., *Fundamentals of Private Pensions* 628 (6th ed. 1989)—makes a withdrawing employer responsible for any unfunded vested benefits attributable to its employees and for a pro rata share of the unfunded vested benefits of "or-

phaned" employees (such as participants whose employers have gone out of business) as well.

2. In ERISA, Congress established a categorical transfer requirement only with respect to multiemployer pension plans and only where there has been a change in the employees' collective bargaining representative. At the same time, however, it is a fundamental precept of ERISA that plan trustees must comply with "strict fiduciary standards" in the discharge of their duties. *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 332 (1981).[17] These fiduciary standards limit the discretion of plan trustees to refuse to transfer assets when a group of participating employers and their employees break off to form a new plan.[18]

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[17] Although the Court has recognized that Section 302(c)(5) of the LMRA implicitly imposes similar fiduciary duties on plan administrators by requiring them to hold plan assets "in trust," see *Amax Coal Co.*, 453 U.S. at 330, it is not clear whether the fiduciary duties created by the LMRA are enforceable in federal courts. See *United Mine Workers of America Health & Retirement Funds* v. *Robinson*, 455 U.S. 562, 573 n.12 (1982) ("The [*Amax Coal Co.*] Court did not decide, nor do we decide today, whether federal courts * * * are authorized to enforce those duties."). The question has limited practical importance in light of the ability of federal courts to enforce the similar duties imposed by ERISA. See 29 U.S.C. 1109(a) ("Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable."); 29 U.S.C. 1132(a)(2) ("A civil action may be brought * * * by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title.").

[18] The petition did not present, and this Court's grant of certiorari does not encompass, the question whether the trustees' refusal to transfer funds violated the fiduciary duty

ERISA requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and * * * with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. 1104(a)(1)(B). Similarly, trustees are prohibited from "act[ing] in any transaction involving the plan on behalf of a party * * * whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries." 29 U.S.C. 1106(b)(2).[19]

These strict prohibitions require the trustees to consider the interests of departing participants, as well as the remaining participants and the plan as a whole. See *Vornado*, 829 F.2d at 421 ("The trustees must reach all decisions guided by their fiduciary responsibilities; they must consider the welfare of the fund and the beneficiaries and are not free to reject all proposed transfers."). To be sure, legitimate fiduciary considerations may suggest that the best interests of all the participants would be served by refusing to transfer assets. Thus, a new plan's failure to request a transfer of liabilities from the old plan

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created by ERISA, because the court of appeals ruled in favor of respondents on the LMRA issue and thus had no occasion to consider respondents' claim that petitioners' refusal to transfer assets breached their fiduciary duties under ERISA. See Pet. App. 12a.

[19] In this regard, 29 U.S.C. 1411(c) provides that the transfer of assets or liabilities between multiemployer plans shall be deemed not to be a violation of Section 1106(a) or (b)(2) if the PBGC determines that the merger or transfer otherwise satisfies the requirements of Section 1411.

(as appears to be the case here) tends to support a fiduciary decision not to transfer plan assets. In any case, prudence requires that trustees consider, among other things, the short- and long-term effects on the plan, whose benefit promises, funding obligations, and currently available assets would be affected by the proposed transfer of funds. Finally, trustees also must consider whether the proposed transfer complies with the asset transfer rules established by Title IV of ERISA, 29 U.S.C. 1411-1415. In sum, trustees must consider requests from departing employers in accordance with the general fiduciary requirements ERISA imposes on them and in accordance with the specific rules established by MPPAA; the appropriate response will depend upon the circumstances of the existing plan and the requested transfer.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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No. 91-610

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,

v.

NICHOLAS DEMISAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.4 of the Rules of this Court, the Western Conference of Teamsters Pension Trust Fund ("the WCT Fund") moves for leave to file the attached amicus curiae brief in support of petitioners Local 144 Nursing Home Pension Fund, et al. Petitioners have consented to the filing of this brief, and their consent is filed herewith. Respondents have refused consent.

The interest of the WCT Fund in this case arises from its position as one of the largest multiemployer defined benefit pension plans in the country. This Court's resolution of the question whether a transfer of pension fund assets to an employer withdrawing from a multiemployer pension plan may be compelled under section 302 of the

Labor-Management Relations Act, 29 U.S.C. § 186, could have a significant impact on the stability and security of the WCT Fund.

Multiemployer defined benefit pension plans provide pension coverage for more than 8 million workers. *See* Pension and Welfare Benefits Administration, U.S. Dept. of Labor, *Trends In Pensions 1992* 590 (John A. Turner & Daniel J. Beller eds., 1992). If the decision below stands, it might require many of the plans in this pension system to change drastically the benefits they pay and the contributions they require. By requiring pension plans to refund some portion of an employer's contributions to the plan when the employer withdraws, the Second Circuit has made some plans vulnerable to collapse by providing an incentive for many employers to withdraw and to use the assets the plans have refunded to set up alternative pension plans for their employees.

The Second Circuit's opinion fails to recognize that defined benefit pension plans operate by necessity on actuarial principles typically applicable to insurers. Had the court recognized that employer contributions to a defined benefit pension fund are analogous to premiums paid for insurance coverage, it is extremely unlikely that it would have reached the conclusion it did.

The arguments of the parties in the Second Circuit focused primarily upon the provisions of the Labor Management Relations Act and the Employee Retirement Income Security Act, without discussing in detail the application of these sections in the context of defined benefit pension plans. The WCT Fund believes that the attached brief will be of benefit to the Court in that it provides a more complete discussion of the principles governing operation of defined benefit pension plans and the effects of employer withdrawal on such plans. Since Congress has repeatedly expressed its approval of defined benefit pension plans, the WCT Fund contends that a full understanding of the impact of the decision below bears directly

upon the question whether Congress intended that section 302 of the Labor Management Relations Act should be interpreted to require a transfer of assets to a withdrawing employer.

Respectfully submitted,

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August 26, 1992

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AMICUS CURIAE BRIEF OF THE WESTERN CONFERENCE OF TEAMSTERS PENSION TRUST FUND IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Western Conference of Teamsters Pension Trust Fund ("WCT Fund") is one of the largest multiemployer defined benefit pension plans in the country, providing pension benefits and coverage to more than 365,000 active and 146,000 retired employees of more than 6600 employers. The WCT Fund is a "Taft Hartley" pension plan. Taft Hartley plans exist by virtue of section

302(c)(5) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 186(c)(5), which provides an exception to the general prohibition on payments by employers to collective bargaining representatives if those payments are made to welfare and pension trust funds meeting certain statutory standards of organization and operation. The WCT Fund is also regulated under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, and operates under the fiduciary standards of ERISA.

As a multiemployer plan, the WCT Fund often experiences employer withdrawals. Withdrawing employers have requested and may in the future request that the WCT Fund repay a portion of their pension contributions so that those funds can be used to establish or augment other multi- or single-employer pension funds. The WCT Fund expects to receive numerous such requests from employers considering withdrawal from the WCT Fund if the Second Circuit's decision is upheld.

An interpretation of section 302 that requires pension funds to transfer assets at the request of an employer could have enormous consequences for the financial stability of defined benefit pension plans. The WCT Fund thus has a direct and substantial interest in the question presented to the Court: whether section 302 of the LMRA requires a multiemployer pension or welfare fund to transfer assets to another pension or welfare fund at the request of a withdrawing employer. Since Taft Hartley plans are creatures of section 302, the WCT Fund believes that the Second Circuit's interpretation of the statute is inconsistent with Congressional intent, and urges reversal of the decision below.

SUMMARY OF ARGUMENT

Defined benefit plans operate as insurance vehicles, promising a stated level of pension benefits over an indeterminate time in the future in return for a specified rate of contribution. Pension payments are made from the assets of the plan. These assets are accumulated through the receipt of employer contributions and the receipt of investment income (primarily dividends, interest and capital gains). The risk inherent in such an arrangement, analogous to an insurance underwriter's risk, is that obligations for pension payments will differ from the amounts anticipated when the rate of contribution was established because experience (e.g. longevity, and investment returns) may differ from that expected. Like insurers, defined benefit plans deal with these risks by using actuarial assumptions to project both assets and liabilities in the future, and by pooling risk across large numbers of participants. Multiemployer plans create economies of scale, cushion against economic slowdowns for a particular employer or region, and create an element of "portability" of pension benefits for employees by allowing them to retain their service credits when they change employers within the plan.

Many of the assumptions regarding the operation of pension and welfare plans made by the Second Circuit in its decision below are not applicable to multiemployer defined benefit plans. The Second Circuit's primary rationale for requiring pension plans to transfer assets to a withdrawing employer was that otherwise many employees of such employers would not receive any "benefit" from their employer's contributions. *Demisay v. Local 144, Nursing Home Pension Fund*, 935 F.2d 528, 534 (2d Cir. 1991). This rationale is inconsistent with the operation of defined benefit plans.

First, because defined benefit plans operate as insurance pools, they depend upon the actuarial certainty that many employees for whom pension contributions are made

will never collect pensions. However, the fact that an employee of a withdrawing employer may not receive a pension does not mean that that employee never received any benefit for the contributions made on his behalf. He received a benefit in the form of coverage under the plan when the contributions were made.

Further, since a defined benefit plan operates as an insurance pool, it is inevitable that some employers will pay more in contributions than the value of the pension benefits promised to their employees. To allow such employers to leave the plan and take their "excess" contributions would create "adverse selection," which might lead to collapse of the plan.

Finally, the Second Circuit's holding ignores the nearly insuperable practical difficulties in attempting to allocate a defined benefit pension plan's assets and liabilities among individual employers. For example, because multi-employer plans allow employees to retain pension credits when they switch employers, it may be impossible to determine which employer's contributions have paid for the benefits promised to any particular employee. Similarly, since employer contributions are pooled, it is essentially impossible to trace a particular employer's contributions to determine which assets of the plan are fairly attributable to that employer, particularly when rates of contribution, interest rates and the plan's actuarial assumptions may fluctuate from year to year.

ARGUMENT

I. INTRODUCTION: THE NATURE OF MULTIEMPLOYER DEFINED BENEFIT PENSION PLANS.

The WCT Fund is a multiemployer defined benefit pension plan as defined by and regulated under ERISA, 29 U.S.C. § 1001, *et seq.*[1] Plans such as the WCT Fund receive contributions made by various employers under the terms of those employers' respective collective bargaining agreements, invest the plan's assets and pay out pension, disability and death benefits. Multiemployer defined benefit plans possess a number of features that make them particularly appropriate for providing pension benefits to employees in industries (such as many of the industries the WCT Fund serves) where employment is seasonal or highly variable and there are large numbers of small- to medium-sized firms. Ironically, these features are precisely those which would make these plans most vulnerable to collapse if the decision below is not reversed.

A. Defined Benefit Plans Operate As Insurance Vehicles.

A "defined benefit" pension plan is so called because an employee's pension under such a plan is calculated on the basis of the employee's years of covered service, and the levels of benefits to which the employee will be entitled is defined in the plan's governing documents.[2] ERISA

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[1] Petitioners herein include both defined benefit pension plans and defined benefit welfare plans. The WCT Fund provides only pension benefits, and this brief is addressed primarily to the effect that the decision below will have on pension plans. Much of the discussion is, however, equally applicable to defined benefit welfare plans.

[2] In 1987, defined benefit plans provided the sole or primary private pension coverage for more than 40 million workers, nearly

pervasively regulates such plans. Once an employee has "vested" under a defined benefit plan (*i.e.*, has completed the required length of service to be entitled to payment of a pension at retirement), a plan must pay benefits regardless of the amount of the employer's contributions on behalf of the employee. ERISA also dictates standards for vesting, in effect controlling the minimum percentages of employees who will vest. ERISA §§ 201-203, 29 U.S.C. §§ 1051-1053.

While an employer's contribution obligations to a defined benefit plan are usually calculated on the basis of a set dollar amount for each hour of a covered employee's work, there is no direct correlation between the amount of the contributions paid by an employer and the total amount of the pension benefits to which that employer's employees may be entitled. In a "defined contribution" plan, by contrast, an employee's benefits are based solely upon the contributions the employer has made on the employee's behalf and the investment returns on those contributions.[3] *See generally* Richard A. Ippolito, *The Economics of Pension Insurance* 16-17 (1989); Dan M. McGill and Donald S. Grubbs, Jr., *Fundamentals of Private Pensions* 105-119 (6th ed. 1989).

As expert testimony in this case confirmed, defined benefit pension plans resemble insurance in two important

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70% of workers who had pension coverage. Pension Benefit Guaranty Corporation, *1990 Annual Report* 23 (1991).

[3] ERISA defines the two types of plans it regulates as:

"(34) The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains, and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

"(35) The term 'defined benefit plan' means a pension plan other than an individual account plan . . . ."

ERISA §§ 3(34), (35), 29 U.S.C. §§ 1002(34), (35).

respects. First, as with life insurance, the true cost of a defined benefit plan cannot be known exactly until the last plan member entitled to benefits has died.[4] Actuarial methods and assumptions must be used to estimate the long-term cost of the promised benefits, to establish contribution rates and to administer an investment program to fund the benefits. Joint Appendix ("J.A.") at 229-231 (Affidavit of A. H. Higgs, Jr. ("Higgs Aff.")); J.A. at 250-252 (Affidavit of Dan M. McGill ("McGill Aff.")). A defined benefit plan must make assumptions about the actuarial characteristics of the plan's participants, trying to anticipate how many will eventually collect benefits and when the benefits will be payable. If the actuarial characteristics of the participants should change, the plan may find itself unable to pay the promised benefits. J.A. at 229-231 (Higgs Aff.); J.A. at 250 (McGill Aff.); *see also* Ippolito, *supra*, at 17-29.

Further, defined benefit plans, like insurance policies, involve the *pooling* of risks. Contributions on behalf of all plan members are aggregated and invested. In this way, contributions made for participants who do not receive benefits help pay for the benefits of those who do. J.A. at 230-231 (Higgs Aff.); *see Phillips v. Alaska Hotel and Restaurant Employees Pension Fund*, 944 F.2d 509, 517 (9th Cir. 1991), *cert. denied*, —— U.S. ——, 112 S. Ct. 1942 (1992). As the Seventh Circuit has pointed out, "pension and welfare plans are insurance vehicles," and

> "*depend* on receiving contributions from persons who collect far in the future or not at all.
>
> "Collective bargaining agreements may call for, say, an annual contribution of $2,000 on behalf of

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[4] As the California Court of Appeal has explained, "In a life insurance policy the risk assumed is to pay upon the assured's death; in a pure annuity [pension] contract the risk is to pay as long as the assured may live." *Estate of Barr*, 104 Cal. App. 2d 506, 508, 231 P.2d 876, 878 (1951).

each employee for medical coverage. The trust pays only if the employee needs care. Older employees need more care, on average. If employers can put only their oldsters, or those who actually need hospitalization, into the plan, the assumptions do not hold. A retirement plan is the same. A defined-benefit plan promises a specified benefit at retirement age after say, 10 years of work. Computations underlying such a plan include two important assumptions: (a) many persons who work in the industry, and have contributions made on their behalfs, will never collect because they do not satisfy the vesting rule (they may quit or die before doing so); (b) many persons who qualify for pensions will work more than ten years. These two categories of workers fatten the pot and support the benefit levels."

Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., 870 F.2d 1148, 1154 (7th Cir. 1989) (emphasis in original; footnote omitted). In typical defined benefit pension plans, the majority of employees for whom pension contributions are being made are not vested.[5] In many plans, particularly those established for industries in which the work force is highly transient, the vast majority of employees for whom contributions are made never vest. *See, e.g., Phillips, supra*, 944 F.2d at 518 (holding that there is no "structural defect" under section 302 of the LMRA in a pension plan whose vesting requirements excluded 97% of all plan participants, and noting that the typical multiemployer plan excluded 85 to 90% of all participants); *Miranda v. Audia*, 681 F.2d 1124 (9th Cir. 1982), *cert. denied*, 464 U.S. 813 (1983) (no structural defect in vesting requirements that excluded 96% of participants).

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[5] In 1989, 53% of employees participating in multiemployer defined benefit pension plans were not vested. Pension and Welfare Benefits Administration, U.S. Dept. of Labor, *Trends in Pensions 1992*, 595 (John A. Turner & Daniel J. Beller eds., 1992).

B. Multiemployer Plans Provide Significant Advantages to Small Employers and Also Give Employees Stability and Flexibility In Their Pension Funds.

A multiemployer plan is " 'simply one large fund contributed to by a number of employers, instead of many smaller funds each contributed to by only one employer.' "[6] *Stinson v. Ironworkers District Council of Southern Ohio & Vicinity Benefit Trust*, 869 F.2d 1014, 1018 (7th Cir. 1989) (quoting *Raymond v. Hoffman*, 284 F. Supp. 596, 601 (E.D. Pa. 1966)). Multiemployer arrangements have a number of advantages. First, such plans provide various economies of scale. Multiemployer plans can distribute risk across greater numbers of participants, lowering the average cost of insurance against extraordinary losses. Pooling contributions by large numbers of employers also gives plans greater financial clout by making it possible for them to make investments requiring larger financial commitments. Moreover, the greater number of participants lowers average administrative costs. *See* McGill & Grubbs, *supra*, at 83. Multiemployer plans are particularly appropriate for industries made up of many small firms, because no employer alone has a large enough "pool" to operate economically.

Second, multiemployer plans cushion the effects of local economic slowdowns.

> "In a Multi-Employer Plan, . . . this pooling arrangement insulates participant employers and their employees from the detrimental effects of changes in the economy. When one employer or industry is doing well financially, another might be doing poorly, yet the Fund remains stable. If the one employer or industry suffers a sudden economic setback, others will be available to maintain the security of the Fund. The basic principle of a Multi-Employer Plan

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[6] ERISA defines a "multiemployer plan" as one which is maintained pursuant to a collective bargaining agreement and to which more than one employer is required to contribute. ERISA § 3(37), 29 U.S.C. § 1002(37).

is the sharing of the risks to insure the security of the Fund."

Caterino v. Barry, 761 F. Supp. 897, 902 (D. Mass. 1991), appeal docketed, No. 91-1542 (1st Cir., Oct. 10, 1991); *Stinson, supra*, 869 F.2d at 1015-16.

Finally, multiemployer plans allow for "portability" of pension benefits. Because all or most of the employers in a particular industry may belong to one benefit plan, an employee can change jobs within the industry without forfeiting accrued benefit rights. McGill & Grubbs, *supra*, at 83. This feature of multiemployer plans is particularly important in industries such as construction, where employment is highly transient and an employee may work for dozens of employers in his career. *Stinson, supra*, 859 F.2d at 1015-16.[7]

These distinctive advantages of multiemployer defined benefit pension plans—the guarantee that benefits will be paid regardless of the value of an employer's contributions, and the pooling of risks and resources among many employers to provide economies of scale, protect against local economic slowdowns and allow portability of benefits —are the precise features endangered by the Second Circuit's decision below. By requiring pension plans to repay some portion of an employer's contributions to the plan when that employer withdraws from the plan, the Second Circuit has undermined the most basic actuarial assumption on which multiemployer pension plans have until now operated and upon which their benefit levels and contribution rates have been calculated—*i.e.*, that many employee participants will never receive pensions. The decision could have serious consequences for the financial stability of the WCT Fund and other defined benefit pension plans.

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[7] Many multiemployer plans also have reciprocity agreements with other plans that permit employees to move from one geographic area to another without forfeiting benefits. *Phillips, supra*, 944 F.2d at 513 n.2.

II. THE SECOND CIRCUIT'S DECISION MISCONSTRUES THE OPERATION OF MULTIEMPLOYER DEFINED BENEFIT PENSION PLANS AND COULD HAVE DEVASTATING EFFECTS ON THEM.

The crux of the Second Circuit's opinion lies in its assertion that,

> "when all the employees of an employer are removed from a fund, there is no chance, actuarial or otherwise, that any of the 'employees of such employer' (with the obvious exception of the already-vested pensioners) will ever receive benefits based on their contributions."

Demisay v. Local 144, Nursing Home Pension Fund, 935 F.2d 528, 534 (2d Cir. 1991). The court concluded that section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5), which states in part that employer contributions to a pension or welfare trust fund may be used only for "the sole and exclusive benefit of the employees of such employer . . . (or of such employees . . . jointly with the employees of other employers making similar payments . . .)," *requires* that a withdrawing employer's contributions follow that employer when it leaves a multiemployer pension or welfare plan to join another plan. *Id.* The court's conclusion is based upon a number of mistaken premises.

A. Under The Second Circuit's Reasoning, Nearly All Defined Benefit Pension Plans Violate The "Sole and Exclusive Benefit" Rule Because Many Participants In Such Plans Never Receive Pensions.

The most obvious error in the Second Circuit's reasoning is implicit in that court's concession that contributions made by a withdrawing employer and retained by a multiemployer plan benefit that employer's *vested* employees. *Demisay, supra*, 935 F.2d at 534. In recognizing that contributions retained by a plan when an employer withdraws benefit *some* of that employer's employees, the Second Circuit undercuts the logic of its

conclusion that such funds are not being used for the "sole and exclusive benefit" of that employer's employees, for section 302 does *not* require that *all* employees of an employer receive the benefit of contributions made on their behalf.

As this Court recognized in *United Mine Workers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982), the "sole and exclusive benefit" provision of section 302 does not prohibit a pension plan from paying benefits to some plan participants to the exclusion of others. As the Court noted, section 302 does not "place[ ] any restriction on the allocation of the funds among the persons protected[.]" 455 U.S. at 572. The Second Circuit itself has held that a pension plan may refuse to refund contributions made by an employer when the funds retained continue to benefit *some* of that employer's employees:

> "To claim that monies retained by the Funds contributed by an employer on behalf of all its employees is not contributed 'for the sole and exclusive benefit of the employees of such employer' whenever some of the employees choose to leave the union and fund would be an unfair and unrealistic construction of section 302(c)(5)."

O'Hare v. General Marine Transport Corp., 740 F.2d 160, 173 (2d Cir. 1984), *cert. denied*, 469 U.S. 1212 (1985).

As the Seventh Circuit noted in *Stinson*, the term "employee" under section 302 includes retirees and disabled workers who are not currently employed but who once had employer contributions made on their behalf. *Stinson, supra*, 869 F.2d at 1020-21. Since these employees continue to receive benefits from the plan when their former employer withdraws, the plan is being operated "for their 'sole and exclusive benefit' and is lawful under [section] 302(c)(5)," even if the plan refuses to refund contributions by the withdrawing employer. *Id.* at 1021. Moreover, since section 302 allows an employer's contri-

butions to be used to benefit employees of other contributing employers, there is no legal requirement that an employer's contributions follow the employer even if all that employer's employees are withdrawn from the plan.

The Second Circuit conceded that some employees of the withdrawing employers in this case will receive pensions from their former plan, but nevertheless required a transfer of assets to a new plan because many other employees will not receive any pensions from those assets. *Demisay, supra,* 935 F.2d at 534. Yet, the actuarial certainty that many employees for whom contributions are made will never receive pensions is the basis on which pension plans such as the WCT Fund have relied in making pension commitments to employee participants. If this actuarial assumption is not valid, the WCT Fund and others that operate like it may find themselves unable to meet their promises. Under the Second Circuit's analysis, nearly all defined benefit plans now operate in violation of the "sole and exclusive benefit" rule of section 302.

B. The Second Circuit Wrongly Assumed That Nonvested Employees Receive No Value for Contributions Made On Their Behalf.

A more fundamental flaw in the Second Circuit's reasoning is also implicit in its assertion that the nonvested employees of a withdrawing employer "will [n]ever receive benefits based on their contributions." *Demisay, supra,* 935 F.2d at 534. That nonvested employees of withdrawing employers may not receive pensions from their former plan does not mean that they received nothing in return for their employer's contributions. Employees of withdrawing employers received value—a "benefit" under section 302—in return for their employer's contributions in the form of coverage under the plan.

Employee participants in a defined benefit plan are analogous to insurance policyholders. In return for premiums, policyholders receive an assurance that they will

receive compensation upon the occurrence of certain contingent events. The fact that an individual policyholder did not make claims during a particular policy period because the contingent events did not occur does not mean that the policyholder received nothing in return for his premiums. What the policyholder received was an assurance that *if* the insured contingent event occurred, certain defined benefits would be paid.

The operation of this insurance principle is obvious in relation to defined benefit welfare plans. Such plans promise that an employee will receive, for example, payment for medical bills in return for the employer's contributions. Even if an employee incurs no medical bills in a plan year, the employee still received something of value in exchange for the employer contributions made on his or her behalf during that year—the employee received protection and coverage under the plan.

The same principle applies to defined benefit pension plans. One of the contingent events against which such a plan insures is the completion of the required years of service for vesting under the plan. The employees who vest during any particular plan year become entitled to a pension. The remaining employees receive a benefit in return for their employer's contributions in the form of accrual of years of service toward satisfying the plan's vesting requirements.[8] Thus, the Second Circuit's concern that the nonvested employees of the withdrawing employers in this case may not receive pensions *in the future* in return for their employer's contributions is misplaced. Those employees received benefits in return for their employer's contributions *when those contributions were made.*

---

[8] Many pension plans insure against events such as death and disability without regard to the vesting requirements for pension benefits. Thus, nonvested employees in such plans also receive value in return for the contributions made on their behalf in the form of insurance coverage for death or disability.

C. The Second Circuit's Attempt to Match Individual Employer Contributions With Benefits Promised to That Employer's Employees Is Contrary to the Purpose of Multiemployer Defined Benefit Plans.

A further mistaken premise in the Second Circuit's analysis lies in that court's assumption that employees participating in defined benefit plans "receive benefits based on their [employer's] contributions." *Demisay, supra*, 935 F.2d at 534. While an employer's contributions on behalf of its employees obviously add to the assets a plan uses to pay pensions, it does not follow that the pensions an employer's employees receive are "based on" or limited by the value of their employer's contributions.

Requiring a pension plan to calculate both the value of the contributions an employer has made and the value of the benefits promised to its employees, as the Second Circuit has done, is contrary to the very purpose of a multiemployer defined benefit plan. A multiemployer defined benefit plan must pay a vested employee the promised benefits regardless whether his or her employer's contributions were sufficient to fund those benefits. This guarantee of payment is one of the reasons that employers agree to join multiemployer plans. By pooling the risk that certain employers will not fund their full share of contributions to the plan—because of bankruptcy, mistake of fact, or simply because an extraordinary number of their employees are near retirement age—a defined benefit plan is able to assure employees that their collectively bargained benefits will continue regardless of their own employer's financial health. *See* J.A. at 229-231 (Higgs Aff.); J.A. at 251-252 (McGill Aff.).

In a multiemployer defined benefit plan, contributions made by a single employer are pooled with those of other employers and go into investment funds established to meet future liabilities to employees whose benefits vest. Because the plan has pooled risks, however, the value of the contributions made by many employers may exceed the actuarial value of the benefits promised to their em-

ployees.[9] J.A. at 231 (Higgs Aff.); J.A. at 251-252 (McGill Aff.). Some employers, for example, may have workforces that are younger than the average in the pension plan, meaning that the contributions necessary to fund benefits for that workforce could be lower than that required for all participants in the plan. The employers with "actuarially favorable" workforces are, in effect, subsidizing the benefits paid to the employees of other employers whose work forces do not have such actuarially favorable characteristics. *See* J.A. at 231 (Higgs Aff.). In return for paying "excess" contributions, employers are assured that their employees will receive the promised benefits even if an employer should, in turn, find itself with an actuarially unfavorable group of employees to which it has made pension commitments.

The trade-off of risks and benefits is the very essence of any insurance pool. The "excess" contributions of the many create a pool available to fund benefits for the few. There is nothing inherently unfair in applying this insurance principle to the contributions of an employer to a defined benefit pension fund.

D. Allowing Employers Who Have Made Contributions to A Multiemployer Plan Greater Than the Value of the Benefits Promised to Their Employees to Claim the "Excess" Is Contrary to Congressional Intent Under the Multiemployer Pension Plan Amendment Act And Could Lead to Collapse of Some Multiemployer Plans.

The Second Circuit apparently realized that its decision could have disastrous effects on defined benefit plans if employers were allowed to demand return of *all* of their contributions to the plan when they withdrew. It therefore remanded the case to the district court with instructions that it

[9] The actuarial value of benefits is the present value of all the promised benefits, discounted by the actuarial assumption regarding the percentage of participants who will not vest or who will fail to collect benefits for other reasons.

"exercise its discretion to shape an appropriate remedy guided by the principle that a fair portion of the reserves reflecting contributions made to the Greater Funds on behalf of the Southern Employees should be reallocated to the Southern Funds where the Southern Funds have undertaken the responsibility to pay the benefits for which the contributions were made."

Demisay, supra, 935 F.2d at 534.

This direction to the district court is unworkable because it assumes that a court could divide plan assets so that the Greater Fund could retain the assets necessary to fund its liabilities to those Southern Employees who had vested and then refund the "excess" assets attributable to contributions from Southern Fund employers. As noted, however, these "excess" assets (if they exist) are precisely those upon which a defined benefit plan depends to pay benefits to the employee of employers who are not able to fund their full share of promised benefits. J.A. at 231-232 (Higgs Aff.); J.A. at 251-252 (McGill Aff.).

There is no need for a transfer of assets to cover liabilities to vested employees when an employer switches pension plans. Since the old plan is obligated to provide benefits to vested employees, the new plan can simply augment the vested employees' pensions from the old plan with benefits earned in the new plan. The Second Circuit's idea that there is a "reserve" to be transferred thus requires plans to recognize a reserve of funds attributable to unvested employees. This amounts to an assault on the foundation of defined benefit plan design, which assumes that persons who are not vested do not have a right to call upon the assets of the fund. A requirement that a defined benefit plan recognize such a right in unvested persons would defeat the actuarial basis of the fund's investment strategy, which pays for the benefits promised to vested employees largely by using contributions on behalf of unvested employees. J.A. at 249, 252 (McGill Aff.).

If a withdrawing employer demands the "excess" value of its contributions—*i.e.*, the amount by which its contributions exceed the plan's vested liabilities to its employees—then the remaining employers must pay more to make up the plan's liabilities to the vested employees of employers who have not made "excess" contributions. The more employers with "excess" contributions who withdraw, the greater the burden on the remaining employers. This phenomenon is known in insurance as "adverse selection," the departure from the insurance pool of participants with favorable actuarial characteristics (*i.e.*, those least likely to suffer an insured loss), leaving the insurance fund with responsibility for a population of participants with actuarially unfavorable characteristics. *See* J.A. at 231-232 (Higgs Aff.).

In pension plans, adverse selection can lead to the sort of plan unravelling that this Court described in *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984):

> "A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue."

467 U.S. at 722 n.2 (quoting Pension Plan Termination Insurance Issues: Hearings before the Subcommittee on Oversight of the House Committee on Ways and Means, 95th Cong., 2d Sess. 22 (1978) (statement of Matthew M. Lind)).

Protecting multiemployer plans against this kind of unravelling was the primary purpose of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. 96-364, 94 Stat. 1208.

> "As enacted, the Act requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets."

Gray, supra, 467 U.S. at 725. The income to the plan from the assessment of withdrawal liability helps to "ensure that employees and their beneficiaries [are not] deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans." *Id.* at 720. The fact that a withdrawing employer may have made contributions in excess of the value of the vested benefits promised to his employees is irrelevant under MPAA—if the plan as a whole does not have assets sufficient to meet the liabilities to its vested employees, withdrawal liability may be assessed. See 29 U.S.C. § 1391.

By allowing employers who withdraw from defined benefit plans to reclaim the "excess" of their contributions over the amount necessary to fund the benefits promised to their employees, the Second Circuit has sanctioned conduct that is directly contrary to Congressional intent as expressed in MPPAA. If the Second Circuit's view of section 302 is correct, employers who have made "excess" contributions may demand return of those contributions even if the plan as a whole is underfunded and withdrawal liability under MPPAA could be assessed. If a plan were not underfunded by MPPAA standards and withdrawal liability could not be assessed, an employer would have an even more powerful incentive to

withdraw from the plan. Withdrawal of employers with "excess" contributions would, however, quickly return a plan to underfunded status—precisely the situation MPPAA was intended to remedy. The Second Circuit's opinion thus returns defined benefit pension plans to the precarious position they occupied prior to passage of MPPAA.

III. THERE IS NO PRACTICAL WAY TO DIVIDE PLAN ASSETS AND LIABILITIES AS THE SECOND CIRCUIT ENVISIONS.

The Second Circuit's opinion not only wreaks havoc with the defined benefit pension plan concept, it creates an actuarial nightmare by requiring plans to treat their assets as separate accounts for each employer and to calculate liabilities to each employee prior to vesting. The practical problems in such an endeavor are nearly insuperable, as experience with withdrawal liability assessments under MPPAA demonstrate.

In MPPAA, Congress required plans to calculate an employer's withdrawal liability by assessing only the plan's *overall* assets and its liabilities only to *vested* employees. 29 U.S.C. §§ 1381, 1391. Congress also dictated detailed methods for calculating these amounts (29 U.S.C. § 1391), granted a statutory presumption in favor of the correctness of a plan's assessment (29 U.S.C. § 1401(a)(3)(A)), and mandated arbitration of any disputes over the amount assessed (29 U.S.C. § 1401(a)(1)). Despite this detailed statutory guidance, MPPAA has unleashed a virtual flood of litigation over withdrawal liability assessments.[10]

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[10] *See, e.g., Combs v. Classical Coal Corp.*, 931 F.2d 96 (D.C. Cir. 1991); *Huber v. Casablanca Industries, Inc.*, 916 F.2d 85 (3d Cir. 1990); *Master, Mates & Pilots Pension Plan v. USX Corp.*, 900 F.2d 727 (4th Cir. 1990); *Park South Hotel Corp. v. New York Hotel Trades Council*, 851 F.2d 578 (2d Cir. 1988), *cert. denied*, 488 U.S. 966; *Board of Trustees of Western Conference of Teamsters Pension Trust Fund v. Lafrenz*, 837 F.2d 892 (9th Cir. 1988); *Board of Trustees, Michigan United Food & Commer-*

The Second Circuit's holding that a withdrawing employer may demand return of at least some portion of its contributions would require much more detailed accounting than that used for MPPAA withdrawal assessments. Such an accounting would require information which the plans have never been required to collect, as well as the use of actuarial projections concerning events the plans never anticipated. J.A. at 231-232 (Higgs Aff.); J.A. at 251-252 (McGill Aff.).

As an example of the practical difficulties lurking in the Second Circuit's holding, imagine that an employer seeks to withdraw from a plan that requires ten years of service before pension benefits vest. If an employee of that employer has only one year of service with the withdrawing employer and eight years of service with other participating employers, the plan has unvested liabilities to the employee for nine years of service. If the withdrawing employer promises to credit all of the employee's prior years of service in a new plan, is the employer entitled to demand that the old plan hand over assets adequate to fund unvested liabilities for nine years of service, or only for the one year for which that employer has actually made contributions? If the employer is entitled to take assets sufficient to cover the liability for all nine years of service, it would be demanding return of contributions made *not* by it, but by *other* contributing employers.

Similarly, ERISA provides that an employee's accrued service in a plan cannot be forfeited if the employee leaves the plan but returns within a period equal to the accrued service. An employee with four years of unvested service, for example, retains those credits if he or she leaves the plan and then returns within four years.

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cial Workers Unions v. Eberhard Foods, Inc., 831 F.2d 1258 (6th Cir. 1987); *Trustees of Pressmen Local 72 Industry Pension Fund v. Judd & Detweiler, Inc.*, 736 F. Supp. 1351 (D. Md. 1988); *Trustees of Amalgamated Cotton Garment & Allied Industries Fund v. Baltimore Sportswear, Inc.*, 632 F. Supp. 641 (S.D.N.Y. 1986).

ERISA § 203(b)(3)(D), 29 U.S.C. § 1053(b)(3)(D). If a withdrawing employer is entitled to demand return of *all* its contributions on behalf of unvested employees, the plan may well be saddled with a large unfunded liability if any of that employer's employees should later return to work for employers who stayed in the plan.

An even more intractable problem arises in attempting to determine the ultimate value of the pension payments an employee will eventually be entitled to collect, and the amount a plan might be entitled to retain to meet the plan's liabilities to the vested employees of a withdrawing employer. This is because pension benefits are not frozen as soon as an employee vests, but continue to accrue value throughout the employee's work life. For example, most plans, including the WCT Fund, pay a retired employee the pension benefits in effect at the time of retirement, so that the value of an employee's past credited service goes up each time the plan and its sponsors agree to adjust pensions upward.

Given the uncertainties in the value of credited service, the Second Circuit's confident belief that a plan could divide its assets when an employer withdraws so that the plan could retain a "reserve" to meet its obligations to that employer's vested employees is misplaced. The assets the plan must retain include not only the contributions made by the employer in the past, but some amount reflecting contributions that would have been made in the future to meet the plan's liabilities for the increasing value of the past service credits of that employer's employees.[11]

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[11] Even if there were a practical way to determine how much a plan's liabilities to a withdrawing employer's vested employees might be, many plans lack sufficient information about their participants to determine exactly what benefits those participants might eventually be entitled to collect. Few plans have complete information about the past work history of all employee participants.

For example, in many pension plans employees can receive "past service" credit for the time that the employee worked for an em-

Not only are the practical problems in attempting to divide fairly a plan's *liabilities* nearly insoluble, the same sorts of problems will arise if a plan attempts to divide its *assets*. In most cases, this would mean attempting to trace an employer's contributions after many years during which the plan treated all its assets as a common pool and kept no records segregating various employers' contributions. *See* J.A. at 251-252 (McGill Aff.). Since a significant portion of most plans' assets consist of "reinvestment" returns (*i.e.*, returns from reinvestment of interest income from employer contributions), it is difficult, if not impossible, to trace any particular employer's contributions. The task becomes even more difficult when the plan must account for fluctuating interest rates, changes in contribution rates, and varying actuarial projections for thousands of different employers who have participated in the plan for periods ranging from weeks to decades.

Requiring a plan to account for a particular employer's contributions and then to split its assets to return

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ployer in the industry the plan serves before that employer began contributing to the plan. Suppose an employee started working in 1983 for Employer A, who was a signatory to a Teamster collective bargaining agreement but did not participate in the WCT Fund. If the employee then started working in 1988 for Employer B, who was a member of the WCT Fund, pension contributions would be made for the employee starting on that date. If Employer B withdrew from the plan in 1991, the plan's records as of that date would show that the employee had only three years of covered service. Nevertheless, under the WCT Fund's rules, the employee would be entitled to credit for her work during the time that she worked for Employer A. Under the Second Circuit's reasoning, Employer B could demand return of its three years of contributions when it withdrew, even though the WCT Fund would eventually owe the employee pension benefits for eight years of WCT Fund service. The WCT Fund would be unlikely to discover that the employee had the five years of prior service credit until the employee retired and demanded payment.

those contributions to that employer is particularly difficult for plans such as the WCT Fund which have established dedicated asset portfolios. These are structured series of investments (typically in long term bonds) designed to match the cash flows of benefits expected to be paid in the future to large groups of participants. A plan might, for example, purchase $10 million in long-term bonds in 1985 to fund the payment of pensions to employees who retire in 1995. Such dedications are useful to insulate the participants from reinvestment risks, but depend for their operation on the ability to hold the assets to maturity. *See generally* Martin L. Leibowitz, *The Dedicated Bond Portfolio In Pension Funds—Part 1: Motivations and Basics*, 42 Financial Analysts Journal 68 (Jan-Feb. 1986). If the plan were forced to liquidate such bond portfolios in order to transfer assets to other plans, the plan would lose its insulation from market fluctuations and the result would be diminished pension security for all participants.

The Second Circuit avoided these and other practical problems that its holding would present by remanding the case to the distirct court with instructions that *it* devise a "fair" plan to divide the plan's assets. *Demisay, supra*, 935 F.2d at 534. The Second Circuit's instruction to the district court was more a fond wish than a workable proposal. There is no "fair" way to divide the assets and liabilities of a multiemployer plan so that a single employer can capture so-called "excess" contributions made over a period of years or decades.

CONCLUSION

Multiemployer defined benefit welfare and pension plans have been encouraged by Congress at least since passage of the LMRA in 1947. ERISA regulates these plans extensively, and MPPAA was specifically designed to help ensure their survival by controlling the fashion in which employers can withdraw from the plans. Despite these ample signs of Congressional approval of multiemployer defined benefit plans, the Second Circuit has interpreted the LMRA as requiring steps that could lead to their collapse. The decision is neither logical, nor fair to the participants, and should be reversed.

Respectfully submitted,

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August 26, 1992

No. 91-610

In The
Supreme Court of the United States
October Term, 1992

Local 144 Nursing Home Pension Fund, *et al.*,
Petitioners,
v.
Nicholas Demisay, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS IN SUPPORT OF PETITIONERS

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LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,
v.

NICHOLAS DEMISAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

Central States, Southeast and Southwest Areas Pension Fund and Central States, Southeast and Southwest Areas Health and Welfare Fund move the Court for leave to file the attached brief as *amicus curiae* in support of Petitioners Local 144 Nursing Home Pension Fund, et al. Central States urges that the United States Court of Appeals for the Second Circuit be reversed. The reasons for this motion are as follows:

1. Central States Pension Fund is the largest multi-employer defined benefit pension plan in the country. The Pension Fund covers approximately 400,000 active participants and retirees. The Health and Welfare Fund cov-

ers approximately 150,000 active participants and retirees.

2. Central States is governed by the Employee Retirement Income Security Act of 1974, as amended. Sections 4231 through 4235 of ERISA provides the exclusive means for a pension plan like Central States to transfer assets and liabilities to another plan.

3. Trust agreements of both Central States Funds bar employers from any claim on trust assets, including transferring assets to another plan.

4. If the decision of the court of appeals were applied to Central States, it would be obligated to transfer assets to a new plan at the discretion of an employer that withdraws from Central States. Such a transfer would violate the trust agreements and ERISA.

5. Transfers of assets are actuarially unsound and could lead to the insolvency or termination of the Central States Funds and hundreds of similarly situated multi-employer pension plans.

6. Petitioners consent to the filing of this brief. Respondents refuses to consent.

Respectfully submitted,

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BRIEF AMICI CURIAE OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE AND PENSION FUNDS IN SUPPORT OF PETITIONERS

INTRODUCTION

The Central States, Southeast and Southwest Areas Pension Fund previously moved this Court for leave to file a brief *amicus curiae* in support of the petition for a writ of certiorari. This Court granted leave to file the brief *amicus curiae* by order of June 22, 1992. The Central States Pension Fund and its sibling the Central States, Southeast and Southwest Areas Health and Welfare Fund submit the following brief on the merits in

support of petitioners, Local 144 Nursing Home Pension Fund, *et al.*[1] Central States urges reversal of the decision below.

The Central States Pension Fund

Central States Pension Fund is a multiemployer defined benefit pension trust fund established in 1955 by the Central Conference of Teamsters and the Southern Conference of Teamsters (affiliates of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America) and by various employer associations pursuant to section 302(c)(5) of the Labor Management Relations Act (LMRA). The Pension Fund is governed by a Board of Trustees consisting of an equal number of union and management appointees (four of each). The Pension Fund is administered for the exclusive benefit of the participants to whom the Trustees owe an undivided duty of loyalty. The purpose of the Pension Fund is to pay retirement and certain other benefits to participants and their beneficiaries who become eligible under the terms of the Central States pension plan (the "Plan").

The Central States Pension Fund is the largest multiemployer pension plan in the country. Its current assets exceed $11.4 billion and the present value of its liabilities for vested benefits is approximately $13 billion. Under the Plan and Trust Agreement participating employers contribute to the Pension Fund pursuant to their collective bargaining agreements for work performed by their covered (bargaining unit) employees. Employees earn credit (accrued benefits) for covered work periods and after earning 10 years of credit, become vested in the benefits. In order for an employer and its union employees to participate in Central States, their collective

[1] The two funds are jointly administered under the direction of the same 8-member board of trustees. The funds will hereafter be referred to collectively as Central States or individually as the Pension Fund and the Health and Welfare Fund.

bargaining agreement, including the contribution rates, must conform to the Trust Agreement and the Plan. The Pension Fund covers 164,000 retirees presently drawing benefits and 238,000 active participants of approximately 5,000 contributing employers. If an employer's obligation to contribute ceases, then coverage ceases for employees of the employer. Neither employees nor retirees of the employer, however, lose their vested benefits under the Plan; and employees may continue to earn additional benefits by going to work for another contributing employer.

The Central States Health and Welfare Fund

The Central States Health and Welfare Fund was established in 1950 by an Agreement and Declaration of Trust ("Trust Agreement"). The Trust Agreement, as amended, provides for the payment of health and welfare benefits to eligible employees of contributing employers that are signatory to collective bargaining agreements with local unions affiliated with the Central Conference of Teamsters and the Southern Conference of Teamsters.

The Health and Welfare Fund has net assets of more than $100 million and provides benefits to more than 122,000 active participants, as well as 22,000 retirees and their families. The Health and Welfare Fund paid nearly $572 million in benefits during 1990 alone.

As with the Pension Fund, employers make contributions to the Health and Welfare Fund on behalf of employee participants at the rate specified in the applicable collective bargaining agreement. Participation is based on covered service as defined by the collective bargaining agreement. The Trustees of the Health and Welfare Fund are empowered to establish and amend the level of plan benefits.

INTERESTS OF CENTRAL STATES

The Pension Fund

The Trust Agreement of the Central States, Southeast and Southwest Areas Pension Fund (Dec. 31, 1991)[2] provides as follows:

> ARTICLE XV
> BENEFICIAL RIGHTS
>
> No Employer or Union, or Employees, shall have any right, title or interest in or to the Trust Fund or any part thereof other than vesting under the Pension Plan except in accordance with applicable law. There shall be no pro rata or other distribution of any of the assets of the Fund as a result of any Union Employer or group of Employees of Employers ceasing their participation in this Fund for any purpose or reason, except as required by law.

Further, Article III, Section 4 of the Trust provides:

> The Trustees are authorized to receive all Employer Contributions and apply such contributions in the best interest of the Fund. Nothing herein shall give any Employer the right to designate how any contributions shall be applied.

Finally, Article XIV, Section 1, provides in part, "In no event shall Employers, directly or indirectly, participate in the disposition of the Trust Fund or receive any benefits from the Trust Fund." And the pension plan established pursuant to Article VII of the Trust provides: "Employer Contributions shall be irrevocable, shall be held and invested according to the provisions of the Trust Agreement, and shall be used for providing benefits and paying the expenses of the Pension Fund."[3]

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[2] The Trust Agreement is reproduced in Appendix A hereto at pp. 1a-36a. Central States believes the terms of its trust to be typical in substance of most qualified multiemployer pension plans.

[3] Participating employers agree to be bound by these provisions through their collective bargaining agreements and through Par-

The decision of the court of appeals in this case may invalidate the provisions quoted above on the ground that they constitute a "structural defect" under § 302(c)(5) of the LMRA. Under the court's decision Central States may be required to transfer assets (but not liabilities) whenever an employer creates a new plan for the employer's employees.

If this Court does not reverse the court of appeals, then its decision will stand as an invitation to employers to break away from multiemployer defined benefit plans to take advantage of the economic benefits of a forced asset transfer. No multiemployer plan, even a financially strong plan like the Pension Fund, can long withstand the effects of adverse actuarial selection that the court of appeals decision permits (and thus encourages).

The Health and Welfare Fund

The provisions of Trust Agreement for Central States, Southeast and Southwest Areas Health and Welfare Fund[4] are similar to those of the Pension Fund. Article VIII, Section 1 provides:

> No Right, Title, or Interest of Employers and Union—No Employer or Union, or Employees, shall have the right, title or interest in or to the Trust Fund or any part thereof. There shall be no pro-rata or other distribution of any of the assets of the Fund as a result of any Union, Employer or Group of Employees of Employers ceasing their participation in this Fund for any purpose or reason, except as required by law.

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ticipation Agreements executed directly with Central States. A specimen Participation Agreement is reproduced in Appendix C hereto at pp. 70a-78a.

[4] The Trust Agreement is reproduced in Appendix B hereto at pp. 37a-69a. Central States believes the terms of its trust to be typical in substance of most qualified multiemployer health and welfare plans.

Further, Article XI, Section 1 provides in part, "In no event shall the Employers, directly or indirectly, participate in the disposition of the Trust Fund or receive any benefits from the Trust Fund." And finally, Article III, Section 4 provides in part, "Nothing herein shall give any Employer the right to designate how any contribuations shall be applied."

Thus, as it would with the Pension Fund, the court of appeals decision may be read to invalidate each of these provisions as a "structural defect." The concerns, however, are even more immediate. Due to escalating health care costs and demand, the Health and Welfare Fund's current reserves provide approximately a 2-month cushion for benefit payments. The withdrawal by a substantial employer, or group of employers, with a significant portion of the reserves would immediately and negatively impact the financial solvency of the Health and Welfare Fund. Thus the survival of health and welfare funds like Central States may also depend on this Court's reversal of the court of appeals.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Second Circuit posed the following question in the case below:

> [W]hether, when an employer leaves pension and welfare trust funds in favor of another set of trust funds, § 302(c)(5) of the Labor Management Relations Act ("LMRA") requires a reallocation of monies paid to the former funds on behalf of its employees, so that the monies are used "for the sole and exclusive benefit of the employees of such employer" as those terms are used in § 302(c)(5).

The court answered yes, that it was a structural defect under § 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), for a multiemployer pension plan and a multiemployer health and welfare plan that were established pursuant to collective bargaining to re-

fuse to transfer assets attributable to contributions made on behalf of an employer's employees when the employer left the old plans and joined new plans. The court held that a portion of the assets of the old plans must be transferred involuntarily to the new plans upon demand of the employer. If the court of appeals is correct, then the financial integrity and solvency of all such trust funds is placed in immediate jeopardy. Forty years of settled expectations and reliance under the LMRA will have been undone. If allowed to stand, the court of appeals decision would allow employers to select adversely against the actuarial interests of Central States and other such plans. Indeed, it may be in the direct pecuniary interest of an employer to take advanatge of this change of law to seize a portion of the pooled assets for their more direct benefit.

It would be difficult to overstate the impact of the decision below on multiemployer plans. These plans are pooled trusts pursuant to the requirements of the LMRA and the Employee Retirement Income Security Act of 1974 (ERISA) under which all the assets of the plan are available to satisfy any benefit under the plan. The court of appeals has in effect, however, empowered employers who contribute to such plans with the right to divert assets attributable to contributions on behalf of their specific employees to another plan without regard to the liabilities left behind in the old plan. This may not be a power that every employer will wish to use—at least initially. Only those employers that stand to gain economically will have the incentive to leave the old plan. This is a zero-sum game, however. If the employers who leave achieve an economic gain, then the old plan and the employers that remain behind are the losers. Because it is generally in the pecuniary interests of employers to make such choices, each withdrawal creates a growing deficit in the old plan and additional incentive for more withdrawals, escalating until plan failure and termination.

The court of appeals failed to grasp the underlying nature of these funds as insurance vehicles and that to survive they must follow insurance principles. It is axiomatic that in any defined benefit plan not every participant will receive a benefit under the plan. Only participants who meet the service and other requirements for benefits will receive them. Amounts contributed on behalf of those who do not earn benefits, fund, in part, the benefits of those who do. This translates into universally accepted actuarial funding assumptions under which employers pay less in contributions per participant. If the court of appeals were right, then the funding assumptions of all multiemployer defined benefit plans have been wrong since their inception.

The court of appeals, however, was wrong. There is no structural defect under § 302(c)(5) of the LMRA when a plan prohibits a transfer of assets because the LMRA expressly permits assets contributed by an employer to be used to satisfy benefits of the employees of any covered employer, not just the contributing employer. If there were any questions about the meaning of the words of that statute, then ERISA should have laid it to rest. ERISA comprehensively governs asset transfers between pension plans—a fact ignored by the court of appeals—and ERISA does not require (indeed would prohibit) a transfer like that mandated by the court below.

The decision below undercuts the foundations of multiemployer plans, thus subverting the policies of both the LMRA and ERISA and threatening the continuing existence of these plans. The court of appeals should be reversed.

ARGUMENT

I. THE DECISION BELOW ENCOURAGES ADVERSE SELECTION AGAINST THE ACTUARIAL PREMISES UPON WHICH PLANS LIKE CENTRAL STATES ARE BASED, THUS DEFEATING THE INSURANCE PRINCIPLE AND HASTENING THEIR DEMISE

The decision below strikes at the heart of Taft-Hartley trust funds. The overarching principle upon which they are based is that of risk pooling supported by the assets of a pooled trust. The trust fund contracts to pay specified benefits to covered participants (employees) and their beneficiaries. The employer contracts to make contributions at a set level. The contributions and the benefits are linked actuarially based on the characteristics of the plan as a whole. Thus, when an employer joins the plan, its contributions are based on established actuarial rates and not on the characteristics of its individual employees.

In this regard multiemployer trust funds operate very much like insurance companies. "Yet pension and welfare plans are insurance vehicles. Insurers depend on receiving contributions from persons who collect far in the future or not at all. *Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148, 1154 (7th Cir. 1989); *Central States, Southeast and Southwest Areas Pension Fund v. Independent Fruit and Produce Co.*, 919 F.2d 1343, 1348, n.3 (8th Cir. 1990) *cert. denied*, 112 S.Ct. 59, 116 L.Ed.2d 35 (1991).[5] Indeed insurance companies are their chief

[5] The Ninth Circuit has grappled with the nature of these pension funds, concluding they are "neither pure deferred compensation nor pure incentive and reward" but rather both. *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509, 517 (9th Cir. 1991) *cert. denied*, 112 S.Ct. 1942, 118 L.Ed.2d 548 (1992). "The formula necessarily assumes that the pensions of a significant number of employees may never vest." *Id.* The court

competitors.[6] The contributions made by an employer are equivalent to the premium the employer would otherwise pay to the insurance company for similar benefits. And, of course, as with all services based on insurance principles, there are economic winners and economic losers.[7] Some participants will live longer and draw more benefits than others (perhaps even more than the contributions made on their behalf). Other participants may suffer catastrophic medical contingencies that are far more costly than the contributions made for them. But we do not know in advance who will be the "winners." This is simply risk sharing (insurance) in action.

It is beyond cavil that multiemployer trust funds are built around this principle and ERISA amply supports it. Indeed multiemployer funds differ from insurance companies in two ways that are significant here, and draw them even closer to pure insurance than a typical insurance company. First employees continue to earn service credit as long as they are employed by any of the 5000 contributing employers (or any new employer that chooses coverage). Tying the value of any one participant's benefits to one employer is practically impossible. Even if it could be done as of a date of transfer, later acts could retroactively change the value (*e.g.*, an employee in the new fund transferring back to the old fund).

Second, multiemployer funds are more likely to use universal ratings, which produce contribution rates

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is right; that is the nature of this insurance. The decision below, by contrast, is perilously close to adopting (incorrectly) a pure deferred compensation view of these plans.

[6] The Health and Welfare Fund is obviously just like a medical insurance company. The Pension Fund provides a service equivalent to a group annuity policy of a life insurance company.

[7] Multiemployer plans would suffer no less chaos than the insurance industry would if premium payers were suddenly authorized to demand a refund of "unused" premiums to apply toward the purchase of their next policy.

largely independent of the employer's employees' actual characteristics. The participants are assumed to be homogeneous with the whole and contributions are level. The employers take advantage of this when they join the plan (before they know what their actual experience will be). Thus, the employers also are insured. Having gotten what they paid for in Petitioner's fund, employers like those now in Respondent's fund simply wish to be re-rated with perfect hindsight—to get more than they paid for.

The court of appeals, however, ignores the insurance nature of these funds. Another statute, the LMRA, overrides the insurance principle according to the court and requires the employees of each employer to be the direct beneficiary of that employer's contributions. In other words multiemployer trust funds that purport to apply insurance principles (all of them) are flawed from the start with a "structural defect," if that court is right.

Central States does not here claim that Congress could not, if it desired, require an employer's contributions to benefit only its own employees. Rather, Central States argues that Congress did not enact such a rule. Indeed such a rule, if implied by § 302(c)(5) would severely undercut that very provision. Section 302(c)(5) was designed to permit the creation of these trust funds. Ironically, the Second Circuit's interpretation of § 302(c)(5) would, if affirmed, destroy them.[8]

The court of appeals appeared to believe that its decisions was limited in scope, but it is not. It allows any group of employers to create (with the union) competing

[8] At a minimum, Central States would have to adjust contribution rates to fit the characteristics of the employees of each employer individually, and in the case of the Health and Welfare Fund might have to limit benefits to the contributions received from the employer. But then it is not group insurance, but only a bank account. If it ceases to be insurance, employers would abandon the Funds in droves.

trust funds and demand that assets attributable to contributions of those employers be turned over to the new fund. But the court offers no reasoned basis why its decision would not apply equally to any individual employer, either by agreement with the union or without such an agreement (if the collective bargaining agreement had expired), who withdraws from a plan.

Further, the decision below encourages such withdrawals. Central States, like many such funds, already finds itself with a declining contribution base,[9] which will only be aggravated. If the work force is not uniform within each employer, the employees transferred to the new plan may have favorable actuarial attributes from a funding standpoint that would enhance their value to the new plan and the loss to the old plan. This would be the case if the transferred employees were younger than those left in the old plan. Younger employees may not vest in their pension benefits thus creating benefit forfeitures that allow assets contributed on their behalf to be applied to other vested benefits thus reducing the need for current contributions. And even if some of the younger employees do vest, there is generally more time available before their retirement to fund their benefits—a factor that also reduces the need for current contributions.

This is adverse actuarial selection, which is anathema to the insurance principle.

> Our pattern must be common: An employer wants some of its employees to have pension and health benefits, and others not. Some may be only a few years away from vesting. Pension and welfare trusts, like insurers generally, want to avoid 'adverse selection', the dropout of persons safer or younger than the pool's average. Funds insist that members of a group be in or out as a bloc: the fund cannot

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[9] Since 1980 Central States has lost 150,000 participants as thousands of employers have ceased contributing to the Pension Fund.

> cover the old and infirm at a rate computed from group averages while receiving nothing on behalf of younger employees. Employers often strongly wish it were otherwise. Local unions may not care about selective inclusion in pension plans (since the costs are borne by employers in other parts of the country), and from their perspective having some workers covered is better than having none.

Central States v. Gerber Truck Service, 870 F.2d 1148, 1151-52 (7th Cir. 1989). That by itself is an incentive to withdraw that is only barely offset in pension plans by withdrawal liability. 29 U.S.C. § 1381 *et seq.* If the employers can demand assets of the plan, the withdrawal liability will be offset, making withdrawal more attractive, thus further undercutting the purposes of ERISA.[10] Health and welfare plans have no withdrawal liability but there are similar incentives to withdraw.[11] A younger population tends to draw less on health benefits, but some reserves are necessary to pay current claims. If a new plan can demand a stake from the old plan, then the new plan can lower contributions (or raise benefits) because it is cheaper to maintain, while the old plan must replenish reserves (if it can) through higher contributions (or reduced benefits). Other employers in the old plan will be increasingly moved to withdraw as well until the old plan terminates.

Taken to its logical limit, the decision below would, at least, turn a multiemployer trust funds like Central States into simply aggregates of single-employer plans.

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[10] Withdrawal liability is the employer's share of unfunded vested benefits, calculated as of the end of the year preceding withdrawal. 29 U.S.C. §§ 1381, 1391(c)(2)(C)(I). To charge the employer for a share of the present value shortfall only to then refund a share of "reserves" would be absurd. In fact, ERISA allows offsets to withdrawal liability only to the extent vested liabilities in excess of assets are transferred to the new plan. 29 U.S.C. § 1415.

[11] Employees and their unions are also affected by these incentives to withdraw. Lower benefit costs may mean higher wages.

The fund would be responsible to each employer (and its employees) for the contributions made by each. Under the current structure, however, plan are obligated to pay benefits even if they exceed contributions. It is mathematically obvious that if plans must pay no less than that contributed but may be required to pay more, then outflow must exceed income. This disastrous instability could only be overcome by termination or restructuring into single-employer plans.

II. NEITHER THE LMRA NOR ERISA SUPPORT THE DECISION BELOW, WHICH UNDERCUTS THE POLICIES OF BOTH STATUTES

The consequences of the decision below are wholly unnecessary of course, because the court of appeals was wrong. The LMRA dictates no structural defect. In requiring that employer contributions inure solely to the benefit of employees of the employer the statute was using terms of art. Section 302(c)(5) expressly provides that contributions are to inure to "the sole and exclusive benefit of the employees of such employer . . . (jointly with the employees of other employers making similar payments . . .)." Under a multiemployer trust fund all participants are, in effect, deemed to be employees of each employer precisely to avoid the structural problem perceived by the court below.[12] There is no structural defect under § 302(c)(5) because all of the objectives of that statute are still met where the assets remain with the original trust to be used for trust purposes—benefits to employees.

Even if the LMRA were not so clear, ERISA is, and the court of appeals entirely failed to appreciate the relationship between the two statutes. The LMRA is the original authorizing statute for jointly trusteed funds

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[12] ERISA also provides that all participants be treated as if employed by a single employer. See *e.g.*, 29 U.S.C. § 1060(a)(1) (minimum vesting rules); § 1060(a)(3) (minimum funding rules).

like Central States. It is through ERISA, however, that Congress chose to regulate qualified funds; and ERISA does this comprehensively and completely when it comes to transfers of plan assets. Since ERISA is a statute and is not subordinate to the LMRA, it must follow that when a plan is qualified under ERISA in a particular respect, it accords with the LMRA in that same aspect. If there is an ambiguity in the LMRA (or in this case a court-created inconsistency), then ERISA, the implementing statute, governs. And even if there were a conflict between the statutes, ERISA, the newer statute, would express the more current view of Congress, constituting, then, a silent amendment to the LMRA.[13] Here there is no question that Central States and petitioners are qualified plans under ERISA, and accord fully with ERISA in their refusal to transfer assets.[14] Accordingly they are not deficient under the LMRA.

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[13] Even courts that reject ERISA preemption of the LMRA nonetheless recognize a need for judicial restraint in upsetting ERISA's balance. "Altering a pension plan's long-range actuarial assumptions can be risky business with repercussions extending to participants and times far beyond the case at hand." *Phillips v. Alaska Hotel Pension Fund*, 944 F.2d at 518.

[14] Under 29 U.S.C. § 1411 they are permitted to transfer assets and liabilities but are not required to do so (except in very limited circumstances under 29 U.S.C. § 1415). Further, 29 U.S.C. § 1058 requires that benefits (on a termination basis) not be impaired by a transfer (*i.e.*, the ability to satisfy benefits out of current assets).

CONCLUSION

Central States was created nearly 40 years ago (other funds are older), and ERISA is almost 20 years old. It is, from a practical standpoint, a bit late in the day to discover a latent defect that turns on their heads the operating principles of these institutions and thereby destroys them. This Court should not do so without the clearest statutory command. The court of appeals disregarded the express language of the LMRA, ignored the commands of ERISA, subverted the policies of both statutes, and undermined the founding principle [insurance] of all multiemployer plans. This Court should reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

TRUST AGREEMENT

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

AS AMENDED THROUGH DECEMBER 31, 1991

REVISED AND AMENDED TRUST AGREEMENT FOR CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND

This AGREEMENT and DECLARATION of TRUST, made and entered into this sixteenth day of March, 1955 by and between CENTRAL CONFERENCE OF TEAMSTERS, SOUTHERN CONFERENCE OF TEAMSTERS, and their affiliated Local Unions, hereinafter referred to collectively as the "UNION", and the SOUTHERN MOTOR CARRIERS LABOR RELATIONS ASSOCIATION; MOTOR CARRIERS EMPLOYERS CONFERENCE—CENTRAL STATES; CARTAGE EMPLOYERS MANAGEMENT ASSOCIATION; CLEVELAND DRAYMEN ASSOCIATION, INC.; and NORTHERN OHIO MOTOR TRUCK ASSOCIATION, INC.; for and on behalf of themselves, their constituent members, and such other Employers who are or may become parties hereto, hereinafter collectively referred to as the "EMPLOYER", and the individual Trustees, hereinafter referred to as the "TRUSTEES", selected as hereinafter described, accepting the Trust obligations herein declared:

WITNESSETH:

WHEREAS, the Union and the Employer believe that it is in the best interest of the Employees of such Employer represented by the Union, and the families and dependents of such Employees, to provide for retirement benefits and for that purpose to establish a Trust Fund as hereinafter provided; and

WHEREAS, the Union and the Employer have heretofore entered into collective bargaining agreements under the terms of which it is provided that the Employer shall contribute certain agreed-upon sums of money therein set forth to a Pension Fund, which shall be known as the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND; and

WHEREAS, Employee Trustees and Employer Trustees have been designated as the Trustees of the Trust in accordance with the provisions of such Agreement.

NOW THEREFORE, for and in consideration of the premises and of the mutual covenants and agreements herein contained, the Union and the Employer hereby accept and adopt all of the provisions herein contained, and the Trustees declare that they will receive and hold the contributions and any other money or property which may come into their hands as Trustees (all such contributions, money and property being hereinafter referred to as "the Trust Fund"), with the powers and duties, uses, and purposes as hereinafter set forth, to-wit:

ARTICLE I

DEFINITION OF TERMS

Sec. 1. Employer—The term "Employer" as used herein shall mean any employer who is bound by a collective bargaining agreement with the Union, or any employer not presently a party to such collective bargaining agreement who satisfies the requirements for participation as established by the Trustees and agrees to be bound by this Agreement.

Sec. 2. Union—The term "Union" as used herein shall mean the CENTRAL CONFERENCE OF TEAMSTERS, THE SOUTHERN CONFERENCE OF TEAMSTERS, and their affected affiliated Local Unions, and such other unions as the Trustees may agree upon.

Sec. 3. Employee—The term "Employee" as used herein shall include:

(a) A person who is employed under the terms and conditions of a collective bargaining agreement entered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective

bargaining agreement or applicable law to be made to the Fund by the Employer; or

(b) All persons employed by the Union, upon being proposed by the Union and after acceptance by the Trustees; and as to such Union personnel the Union shall be considered an Employer solely for the purposes of contributions within the meaning of this Agreement and Declaration of the Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits; or

(c) All persons employed by the Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees; and as to such Trust personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits.

(d) All persons who are Trustees of Central States, Southeast and Southwest Areas Pension Fund or Central States, Southeast and Southwest Areas Health and Welfare Fund upon acceptance by the Trustees, as hereinafter defined; and on behalf of such persons who are Trustees, their Employers shall make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust for the same benefits.

(e) In all instances the common law test or the applicable statutory definition of master-servant relationship shall control employee status.

(f) The continuation of employee status once established shall be subject to such reasonable rules as the Trustees may adopt according to law.

Sec. 4. Trustees—The term "Trustees" or "Board" as used herein shall mean the Trustees designated in this Agreement and Declaration of Trust together with their successors designated and appointed in accordance with the terms of this Agreement.

Sec. 5. Trust Fund or Fund—The term "Trust Fund" or "Fund" as used herein shall refer to all property of whatever nature which shall be in said Trust created by this Agreement.

Sec. 6. Employer Contributions—The term "Employer Contributions" as used herein shall mean payments made by Employers to the Trust Fund herein created.

ARTICLE II

CREATION OF TRUST FUND AND BOARD OF TRUSTEES

Sec. 1. Designation—The Union and the Employer hereby create and establish, with the Trustees herein provided for, a Trust to be known as the Central States, Southeast and Southwest Areas Pension Fund which shall be comprised of assets derived from Employer Contributions made pursuant to the collective bargaining agreement between the parties (plus any additional sum or sums from Employer Contributions which may hereafter be agreed upon by the Employers and the Union set forth in written collective bargaining agreements), together with all insurance and annuity contracts (including dividends, refunds, or other sums payable to the Trustees on account of such insurance and annuity con-

tracts) and all investments made and held by the Trustees on account of such insurance and annuity contracts, all investments made and held by the Trustees, all moneys received by the Trustees as contributions or as income from investments made and held by the Trustees or otherwise, and any other property received and held by the Trustees for the uses, purposes, and trusts set forth in this Agreement and Declaration of Trust, where any of the foregoing is derived from the Employer Contributions.

Sec. 2. Board of Trustees—There is hereby created a Board of Trustees consisting of four (4) persons representative of the Employers and four (4) persons representative of the Employees. The Employer Trustees shall be designated as follows: One (1) Trustee shall be designated by each of the following Employer groups, acting either alone or jointly as herein indicated:

A. Southern Motor Carriers Labor Relations Association;

B. Cleveland Draymen Association, Inc., Northern Ohio Motor Truck Association, Inc., and Cartage Employers Management Association.

Two (2) Trustees shall be designated by the following Employer group:

C. Motor Carriers Employers Conference—Central States.

The Employee Trustees shall be designated jointly by the Union, as defined in Article I, Section 2 of this Agreement.

No person shall be designated a Trustee by the appointing authority if the person is subject to the disqualification defined in Section 9 of Article XIV of this Agreement.

Effective April 1, 1983, the term of office of each Trustee is a multi-year period, subject to reappointment

of the same Trustee or appointment of another Trustee by the appointing entity at the end of such multi-year period, and also subject to appointment of a Successor Trustee pursuant to Section 5 of Article II of this Agreement. The multi-year period of every such appointment and reappointment of a Trustee effective on and after April 1, 1983 shall be four (4) years, *except* for the extension described in the remainder of this section, and *except* for the transition terms as follows: the Employer groups designed to appoint Employer Trustees will allocate and exercise their respective appointment authority to appoint Employer Trustees, without limitation of their separate and independent authority, as follows: one Employer Trustee to serve a term from April 1, 1983 through March 31, 1986; one Employer Trustee to serve a term from April 1, 1983 through March 31, 1987; one Employer Trustee to serve a term from April 1, 1983 through March 31, 1988; and one Employer Trustee to serve a term from April 1, 1983 through March 31, 1989; and the Union will allocate and exercise its authority to appoint Employee Trustees as follows: one Employee Trustee to serve a term from April 1, 1983 through March 31, 1986; one Employee Trustee to serve a term from April 1, 1983 through March 31, 1987; one Employee Trustee to serve a term from April 1, 1983 through March 31, 1988; and one Employee Trustee to serve a term from April 1, 1983 through March 31, 1989. Effective August 20, 1986 the multi-year term of office of each Trustee is extended until September 22, 1992, in connection with the initial minimum ten-year term of the Consent Decree entered on September 22, 1982 in *Brock* v. *Fitzsimmons, et al.*, No. 78 C 342 (N.D. Ill.). The term of office of each Trustee whose appointment would have expired March 31, 1987, except for the trust amendment adopted at Trustee meetings on August 19 and 20, 1986, or of the Successor Trustee appointed to replace such Trustee, will expire on March 31, 1993. The terms of office of each Trustee whose appointment

would have expired on March 31, 1988, 1989 and 1990, except for the same 1986 trust amendment, or of the Successor Trustee appointed to replace such trustee, will expire on March 31, 1994, 1995 and 1996, respectively, in order to effectuate an appointment or reappointment of one Employer Trustee and one Employee Trustee effective on each April 1 after September 22, 1992. All such expiration dates shall be determined on the basis of the the trust amendment adopted at Trustee meetings on August 19 and 20, 1986.

Sec. 3. Term of Trustees—Each Trustee shall serve until expiration of his term of office established in accordance with Section 2 of Article II of this Agreement or until, on a date prior to expiration of his term of office, he shall die, become incapable of acting hereunder, resign, become disqualified for the position under applicable law or under Section 9 of Article XIV of this Agreement, or be removed as herein provided.

Sec. 4. Manner of Acting in Event of Deadlock—In the event a deadlock develops between the Employer and Employee Trustees, or between the Trustees, the Trustees shall appoint a neutral party empowered to break such deadlock within a reasonable length of time. Such neutral party may be appointed in advance of any such deadlock. In the event the Trustees are unable to agree upon a neutral party, or in the event such neutral party is unable to act, either the Employer or the Employee Trustees may petition the District Court of the United States for the Northern District of Illinois, Eastern Division, for appointment of a neutral person, as provided in Section 302(c) of the Labor Management Relations Act of 1947, as amended.

Sec. 5. Vacancy in Board of Trustees—In case of vacancies by death, legal incapacity, resignation of otherwise of the Employer Trustees or Employee Trustees, a successor thereto shall be appointed as provided in Arti-

cle II, Section 2 hereof. Any Trustee or Trustees shall have the right to resign on written notice to the remaining Trustees, and to the Executive Director; said notice shall specify the effective date of such resignation, which shall be no later than fifteen (15) days after said notice is received by the Executive Director, except that said resignation shall in any event become effective no later than appointment of, and acceptance of appointment by, a Successor Trustee, in accordance with Article II, Section 7 of this Agreement.

Sec. 6. Removal of Trustees—Any Employer Trustee may be removed, with cause, at any time by the Employer association or group appointing such Employer Trustee; in the event of such removal of such Employer Trustee, the Employer association or group removing such Trustee shall appoint a Successor Trustee. Any Employee Trustee may be removed, with cause, at any time by the Union. The Trustees shall also have the authority and duty to act to remove a Trustee holding office in violation of law.

Sec. 7. Designation of Successor Trustee—In the event of a vacancy under either Section 5 or Section 6 above, the Successor Trustee shall be designated in writing by the appointing authority, and such Successor Trustee shall accept such appointment in writing in a form satisfactory to the Trustees. The term of office of any Successor Trustee shall be the remainder of that unexpired term. Both the designation and acceptance shall be filed with the Executive Director of the Fund.

Sec. 8. Limitation of Liability of Trustees—No Trustee shall be liable or responsible for any acts or defaults of any co-Trustee, any other fiduciary, any party-in-interest or any other person except in accordance with applicable law.

Sec. 9. Office of the Fund—The sole and principal office of the Fund shall be in Chicago, Illinois, for the

transaction of business of the Fund, the exact location of which is to be made known to the parties interested in such Fund. At such office, and at such other places as may be required by law, there shall be maintained all, or any of, the books and records pertaining to the Fund and its administration.

Sec. 10. No One is Agent Without Written Authority —No individual or person may act as agent for the Fund unless specifically authorized in writing by the Trustees. No Employer or Union nor any representative of any Employer or Union, in such capacity, is authorized to interpret the Pension Plan, nor can any such person act as agent of the Trustees. Only the Board of Trustees is authorized to interpret the Pension Plan within the scope of its authority.

ARTICLE III

CONTRIBUTIONS AND COLLECTIONS

Sec. 1. Amount of Constributions—Each Employer shall make continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement between the parties, applicable law, and the requirements for participation in the Fund as established by the Trustees in accordance with Article I, Seciton 1, Article IV, Sections 1, 2, 9 and 14(e), Article X, and Article XII of this Trust Agreement. The Trustees reserve the right to reject contributions from any Employer whose collective bargaining agreement or other agreement or understanding fails to satisfy applicable law or the requirements for participation in the Fund. Upon execution of each new or successive collective bargaining agreement, including but not limited to interim agreements and memoranda of understanding between the parties, each Employer shall promptly submit such contract by certified mail to the:

Contracts Department
Central States, Southeast and
Southwest Areas Pension Fund
9377 West Higgins Road
Rosemont, Illinois 60018-4938.

Any agreement or understanding between the parties that in any way alters or affects the Employer's contribution obligation as set forth in the collective bargaining agreement shall be submitted promptly to the Fund in the same manner as the collective bargaining agreement; any such agreement or understanding between the parties that has not been disclosed to the Fund as required by this paragraph shall not be binding on the Trustees and shall not affect the terms of the collective bargaining agreement which alone shall be enforceable. The obligation to make such contributions shall continue during periods when the collective bargaining agreement is being negotiated, but such contributions shall not be required in case of strike after contract termination, unless the parties mutually agree otherwise.

Sec. 2. Time of Payment—The Trustees shall, by regulation, fix the time for payment of contributions and shall sent a copy of such regulations to each Employer required to contribute.

Sec. 3. Receipt of Payment and Other Property of Trust—The Trustees are hereby designated as the persons to receive the payments heretofore or hereafter made by the Employers to the Trust Fund, and the Trustees are hereby vested with all right, title and interest in and to such moneys and all interest accrued thereon, and are authorized to receive and be paid the same. The Trustees agree to receive all such payments, deposits, moneys, insurance and annuity contracts, and other assets and properties described or referred to in Article II and this Article, and to hold same in Trust hereunder for the uses and purposes of the Trust herein created.

Sec. 4. Collections and Enforcement of Payment—The Trustees, or such committee of the Trustees as the Board

of Trustees shall appoint, or the Executive Director when directed by such committee or by the Trustees, shall have the power to demand and collect the contributions of the Employers to the Fund. Said Board of Trustees shall take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund, without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purpose. The Trustees are authorized to receive all Employer Contributions and apply such contributions in the best interest of the Fund. Nothing herein shall give any Employer the right to designate how any contributions shall be applied.

Sec. 5. Production of Records—Each Employer shall promptly furnish to the Trustees, upon reasonable demand, the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and past industry employment history in its files and such other information as the Trustees may reasonably require in connection with the administration of the Trust. The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust. All Employers shall annually furnish to the Trustees, if requested by them, a statement showing whether:

(a) the organization is a corporation and the names of all of its officers;

(b) if not a corporation, a certificate stating that it is either a partnership or an individual proprietorship and the names of the partners or the name of the individual proprietor.

The Union will comply with any reasonable request of the Trustees to examine those records of the Union which may indicate the employment record of any Employee whose status is in dispute. The names and addresses of participants and beneficiaries are confidential information not to be disclosed by the Trustees except as required by an order of a court of competent jurisdiction, except where necessary for determination of benefits in accordance with the provisions of the Trust Agreement, or as required by law.

ARTICLE IV

POWERS AND DUTIES OF TRUSTEES

Sec. 1. The Trustees shall have authority to control and manage the operation and administration of the Trust in accordance with applicable law.

Sec. 2. The Trustees shall hold, manage, care for, and protect the Trust Fund and collect the income therefrom and contributions thereto, except to the extent that any of these functions or responsibilities are assigned to another entity or entities pursuant to any provision of this Article.

Sec. 3.

(a) The Trustees appoint Morgan Stanley Group Inc. (hereinafter identified as "Morgan Stanley") as Named Fiduciary of the Fund as defined in Section 402 of the Employee Retirement Income Security Act of 1974, with such rights, powers, authority, duties and responsibilities as are stated in an agreement dated as of October 27, 1989 (hereinafter identified as "the Named Fiduciary Agreement"), entered into by the Trustees with Morgan Stanley, and as are stated in a Consent Decree (hereinafter identified as "the Consent Decree") entered September 22, 1982 in an action styled *Brock* v. *Fitzsimmons, et al.*, No. 78 C 342 (N.D.

Ill.). The effective date of the appointment of Morgan Stanley as Named Fiduciary of the Fund is January 20, 1984, and such appointment shall remain effective until termination or resignation in accordance with the Named Fiduciary Agreement.

(b) Each Investment Manager appointed by Morgan Stanley in its capacity as Named Fiduciary of the Fund shall have the power and authority, in its sole discretion, to invest and reinvest the principal and income of the Trust Fund, delegated to it for management, in such securities, common and preferred stock, mortgages, notes, real estate or other property as shall be permissible investments in accordance with applicable law and agreements, and may sell or otherwise dispose of such securities or property at any time and from time to time as it determines to be in accordance with its fiduciary obligations.

(c) Morgan Stanley shall have the power and authority, in its sole discretion, to invest and reinvest assets of the Fund in the following group trusts, selected and designated by Morgan Stanley and maintained as domestic trusts in the United States: Mellon Bank, N.A. Employee Benefit Collective Investment Fund Plan, which is maintained by Mellon Bank, National Association; Wells Fargo Institutional Trust Company Index and Market Group and Common Trust Funds for Employee Benefit Trusts, which is maintained by Wells Fargo Institutional Trust Company, National Association; and Wells Fargo Institutional Trust Company Group and Common Investment Trust Funds for Employee Benefit Trusts, which is maintained by Wells Fargo Institutional Trust Company, National Association. To the extent Morgan Stanley invests the Trust Fund in such

group trusts, the group trusts will be adopted as part of the Fund and the trust instruments of such group trusts and any amendments of those instruments will be incorporated in this Agreement, provided that such trusts are tax-exempt organizations under Section 501(a) of the Internal Revenue Code.

(d) With respect to all assets of the Fund except those assets which are then subject to the exercise by Morgan Stanley of its rights, powers, authority, duties and responsibilities as Named Fiduciary of the Fund, the Trustees shall have the power, in their sole discretion, to invest and reinvest all or any part of the Trust Fund in such securities and other property as shall be permissible investments by them in accordance with applicable law, and may sell or otherwise dispose of such securities or other property at any time and from time to time as they determine to be in accordance with their fiduciary obligations.

(e) The overall investment policy objective of the Fund is to invest and manage the assets of the Trust Fund in a prudent and conservative yet productive manner, in order to enhance the ability of the Fund to meet its obligations to participants and beneficiaries. Subject to the overall investment policy objective of the Fund, Morgan Stanley shall develop the short-term and long-term investment objectives and policies of the Fund, in accordance with the Consent Decree, after consultation with the Trustees and with appropriate regard for the actuarial requirements of the Fund.

Sec. 4. With respect to all assets of the Fund except those assets which are then subject to the exercise by Morgan Stanley of its rights, powers, authority, duties and responsibilities as Named Fiduciary or of the Fund, any part of the Trust Fund which is not invested shall

be deposited by the Trustees in such depository or depositories as the Trustees shall from time to time select, and any such deposit or deposits, or disbursements therefrom, shall be made in the name of the Trust in the manner designated by the Trustees and upon the signature(s) designated by the Trustees.

Sec. 5. The Trustees shall keep true and accurate books of account and a record of all their transactions.

Sec. 6. The Trustees shall engage one or more independent qualified public accountants and enrolled actuaries to perform all services required by and in accordance with applicable law and such other services as the Trustees deem necessary.

Sec. 7. The Trustees, to the extent permitted by applicable law, shall incur no liability in acting upon any instrument, application, notice, request, signed letter, telegram, or other paper or document believed by them to be genuine and to contain a true statement of facts, and to be signed by the proper person.

Sec. 8. Any Trustee, to the extent permitted by applicable law, may rely upon any instrument in writing purporting to have been signed by a majority of the Trustees as conclusive evidence of the fact that a majority of the Trustees have taken the action stated to have been taken in such instrument.

Sec. 9. The Trustees are hereby authorized to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust, provided the same are not inconsistent with the terms of the Agreement, and the Articles in the Central States, Southeast and Southwest Areas Agreements creating the Pension Fund. All rules and regulations adopted by action of the Trustees for the administration of the Trust Fund shall be binding upon all parties hereto, all parties dealing with the Trust, and all persons claiming any benefits

hereunder. The Trustees are vested with discretionary and final authority in adopting rules and regulations for the administration of the Trust Fund.

Sec. 10. Any Successor Trustee appointed in accordance with the provisions of this Agreement, upon accepting in writing the terms of this Trust, in a form satisfactory to the Trustees, shall be vested with all of the rights, powers and duties of his predecessor.

Sec. 11.

(a) The Trustees may assign, from time to time, various administrative matters to such committees and subcommittees of Trustees, or to such other individuals or organizations, as they may deem necessary or appropriate in their sole discretion. The Trustees may also assign and delegate, from time to time, specified trustee responsibilities to committees and subcommittees of Trustees, as they deem necessary or appropriate in their sole discretion. Committees and subcommittees of Trustees shall consist of an equal number of Employer and Employee Trustees.

(b) The Trustees may establish a Public Advisory Board consisting of four (4) persons, two (2) to be designated by a majority of the Employer Trustees and two (2) to be designated by a majority of the Employee Trustees. Such Public Advisory Board, if established, shall act solely in an advisory and consultant capacity and shall not have or exercise any fiduciary powers, responsibilities or duties. None of the members of said Board, individually or collectively, shall have or exercise any discretionary authority or discretionary control respecting management of the Fund, or have or exercise any authority or control respecting management or disposition of any assets of the Fund, or render any investment advice for any fee

or other consideration, or have or exercise any discretionary authority or discretionary responsibility in the administration of the Fund. The Trustees shall establish procedures for submission of matters to the Public Advisory Board, if established, for advice and consultation by said Board. Any payment of compensation and expenses for members of said Board shall be determined by the Trustees.

(c) The Trustees shall appoint an Executive Director, who shall, subject to the directions of the Trustees with respect thereto, be responsible to the Trustees and/or any committee thereof for coordinating the administration of the Fund's assets, office and personnel, for the coordination and administration of accounting and actuarial services, for the preparation of all reports and other documents required to be filed or issued in accordance with law, for the performance of ministerial duties in conformance therewith, and for such other duties duly assigned to him by action of the Trustees. The Executive Director shall be the custodian of the documents and other records of the Fund. To the extent this subsection is contrary to or inconsistent with the Named Fiduciary Agreement, in its description of authority and responsibility of the Executive Director, this subsection shall be inapplicable.

(d) There shall exist an internal audit division of the Fund, for review of administrative expenditures, benefit disbursements and the allocation of income between investments, administration and benefits, and for such other responsibilities as may be assigned by the Executive Director.

Sec. 12. No party dealing with the Trustees shall be obligated:

(a) to see the application to the trust purposes, herein stated, of any money or property belonging to the Trust Fund, or

(b) to see that the terms of this Agreement have been complied with, or

(c) to inquire into the necessity or expediency of any act of the Trustees.

Every instrument executed by the Trustees shall be conclusive evidence in favor of every person relying thereon:

(1) that at the time of the delivery of said instrument the Trust was in full force and effect,

(2) that the instrument was executed in accordance with the terms and conditions of this Agreement, and

(3) that the Trustees were duly authorized and empowered to execute the instrument.

Sec. 13. The Trustees shall, by regulation, establish rules relating to payments of contributions by Employers for Employees during periods of such Employees' illness or disability and related matters but not contrary to applicable collective bargaining agreements.

Sec. 14. The Trustees are hereby empowered, in addition to such other powers as are set forth herein or conferred by law:

(a) To enter into any and all contracts and agreements for carrying out the terms of this Agreement and Declaration of Trust and for the administration of the Trust Fund, and to do all acts as they, in their discretion, may deem necessary or advisable, and such contracts and agreements and acts shall be binding and conclusive on the parties hereto and on the Employees involved.

(b) To keep property and securities registered in the names of the Trustees or in the name of any other individual or entity duly designated by the Trustees.

(c) To establish and accumulate as part of the Trust Fund a reserve or reserves, adequate, in the opinion of the Trustees and in accordance with applicable law, to carry out the purposes of such Trust.

(d) To pay out of the funds of the Trust all real and personal property taxes, income taxes, and other taxes of any and all kinds levied or assessed under existing or future laws upon or in respect to the Trust Fund, or any money, property, or securities forming a part thereof.

(e) To do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder.

(f) To sell, exchange, lease, convey, mortgage or dispose of any property, whether real or personal, at any time forming a part of the Trust Fund upon such terms as they may deem proper, and to execute and deliver any and all instruments of conveyance, lease, mortgage and transfer in connection therewith, except that the powers enumerated in this subsection shall not be exercisable by the Trustees with respect to those assets of the Fund as are then subject to the exercise by Morgan Stanley of its rights, powers, authority, duties and responsibilities as Named Fiduciary of the Fund.

Sec. 15. The Trustees shall be entitled to receive reasonable compensation for services rendered, and the reimbursement of expenses properly and actually incurred, in the performance of their duties to the Fund; except that no Trustee who already receives full-time pay from

an Employer or an association of Employers or from the Union shall receive compensation from the Fund, except for reimbursement of expenses properly and actually incurred.

Section 16. The Trustees shall use and apply the Trust Fund for the following purposes:

(a) To pay or provide for—

(1) the payment of all reasonable and necessary expenses of collecting the contributions and administering the affairs of this Trust, including the employment of such administrative, legal, actuarial, expert, and clerical assistance as may be reasonably necessary.

(2) the purchasing, owning or leasing of such premises as may be necessary for the operation of the affairs of the Trust, and

(3) the purchase or leasing of such materials, supplies and equipment as the Trustees, in their discretion, find necessary or appropriate to the performance of their duties.

(b) To pay or provide for the payment of retirement and related benefits to eligible Employees in accordance with the terms, provisions and conditions of the Pension Plan to be formulated and agreed upon hereunder by the Trustees.

Sec. 17. The Trustees, by majority action, shall have the power to construe the provisions of this Agreement and the terms and regulations of the Pension Plan; and any construction adopted by the Trustees in good faith shall be binding upon the Union, Employees and Employers. The Trustees are vested with discretionary and final authority in construing plan documents of the Pension Fund.

Sec. 18. The Trustees, by resolution, shall provide for fidelity bonds, in such amounts as they may deter-

mine, for their employees and for the Trustees, the cost of which shall be paid by the Fund. The Trustees may purchase insurance coverage to protect the Fund from liability arising out of any error or omission of any Trustee or employee of the Trust, in accordance with applicable law, the cost of which policy shall be paid by the Fund.

ARTICLE V

CONTROVERSIES AND DISPUTES

Sec. 1. In any controversy, claim, demand, suit at law, or other proceeding between any participant, beneficiary, or any other person and the Trustees, the Trustees shall be entitled to rely upon any facts appearing in the records of the Trustees, any instruments on file with the Trustees, with the Union or with the Employers, any facts certified to the Trustees by the Union or the Employers, any facts which are of public record, and any other evidence pertinent to the issue involved.

Sec. 2. All questions or controversies, of whatsoever character, arising in any manner or between any parties or persons in connection with the Fund or the operation thereof, whether as to any claim for any benefits preferred by any participant, beneficiary, or any other person, or whether as to the construction of the language or meaning of the rules and regulations adopted by the Trustees or of this instrument, or as to any writing, decision, instrument or accounts in connection with the operation of the Trust Fund or otherwise, shall be submitted to the Trustees, or to a committee of Trustees, and the decision of the Trustees or of such committee thereof shall be binding upon all persons dealing with the Fund or claiming any benefit thereunder. The Trustees are vested with discretionary and final authority in making all such decisions, including Trustee decisions upon claims for benefits by participants and beneficiaries of the Pension Fund and other claimants, and including Trustee decisions construing plan documents of the

Pension Fund. To the extent this section is contrary to or inconsistent with the Named Fiduciary Agreement, this section shall be inapplicable.

Sec. 3. The Trustees may, in their sole discretion, compromise or settle any claim or controversy in such manner as they think best, and any decision made by the Trustees in compromise or settlement of a claim or controversy, or any compromise or settlement agreement entered into by the Trustees, shall be conclusive and binding on all parties interested in this Trust. To the extent this section is contrary to or inconsistent with the Named Fiduciary Agreement, this section shall be inapplicable.

ARTICLE VI

OPERATION OF BOARD OF TRUSTEES

Sec. 1. Officers—The Board of Trustees shall at each meeting designate a presiding Chairman. The Chairmanship shall be rotated between the Employee Trustees and the Employer Trustees.

Sec. 2. Quorum—A quorum of the Trustees for the transaction of business, except as otherwise specifically provided herein, shall consist of at least four (4) Trustees, two (2) of whom shall be representative of the Employers and two (2) of whom shall be representative of the Employees. A quorum of a committee shall consist of a majority of the members thereof. Upon each matter voted upon at any meeting of the Trustees, the Employee Trustees and the Employer Trustees shall each have the same number of votes based upon the larger number of Employee or Employer Trustees in attendance, as the case may be;—provided, however, that the vote or votes cast by each such Trustee shall be cast as an individual Trustee and not as a part of a block. All actions of the Trustees at meetings shall be by majority vote of those present and voting, a quorum being present. No Trustee may vote by proxy.

Sec. 3. Records of Trustee Action—The Trustees shall make and maintain a record of the actions of the Trustees taken at any meeting thereof. Any action, which may be taken at a meeting of the Trustees, may be taken without a meeting of the Trustees if a consent in writing, setting forth the action so taken, should be distributed to all of the Trustees and should be signed by five (5) of the Trustees, said written consent evidencing the substance of the action of the Trustees so taken.

Sec. 4. Reports—All reports required by law to be signed by one or more Trustees shall be signed by all of the Trustees, provided that all of the Trustees may appoint in writing one or more of their number to sign such report on behalf of the Trustees.

Sec. 5. Power to Act in Case of Vacancy—No vacancy or vacancies in the Board of Trustees shall impair the power of the remaining Trustees, acting in the manner provided by this Agreement, to administer the affairs of the Trust notwithstanding the existence of such vacancy or vacancies.

Sec. 6. Expenses—All proper and necessary expenses incurred by any former or incumbent Trustee, including costs of defense in litigation arising out of the Trusteeship of this Fund, and also including costs incurred by any former or incumbent Trustee in providing testimony or information about administering of this Fund in any investigation, trial or other proceeding, shall be paid out of the Trust Fund, as a matter of right of any former or incumbent Trustee, to the extent permitted by applicable law. As used in the preceding sentence, the term "costs" includes, but is not limited to, reasonable attorneys' fees.

Sec. 7. Meetings—Regular meetings of the Trustees shall be held on the third Wednesday of each month, and on such other days as the Trustees determine, except that such regular monthly meeting date may be changed or postponed either by the Board of Trustees in regular meeting assembled or otherwise by written decision signed

by a majority of the Trustees. Any two (2) Trustees may request a meeting of the Trustees at any time by notifying the Executive Director, who shall arrange the time and place thereof. Written notices of meetings may be delivered in person, by mail, or by telegram. Meetings of the Trustees may also be held at any time without notice if all the Trustees consent thereto.

ARTICLE VII

ESTABLISHMENT OF PENSION PLAN

Sec. 1. Formulation of Plan—The Trustees shall formulate a Pension Plan for the payment of such retirement pension benefits, permanent disability pension benefits, death benefits, and related benefits, as are feasible. Such Pension Plan shall at all times comply with all applicable federal statutes and regulations and with the provisions of this Trust Agreement. The Trustees shali not be under any obligation to pay any pension if the payment of such pension will result in loss of the Fund's tax-exempt status under the then applicable Internal Revenue Code and any regulations or rulings issued pursuant thereto. The Trustees shall draft procedures, regulations, and conditions for the operation of the Pension Plan, including, by way of illustration and not limitation: conditions of eligibility for covered Employees, procedures for claiming benefits, schedules of type and amount of benefits to be paid, and procedures for the distribution of benefits. The Trustees may also provide for the payment of partial pensions, any may enter into agreements with trustees of other pension plans which conform to the applicable sections of the then applicable Internal Revenue Code for purposes of tax deductions, for the reciprocal recognition of service credits and payments of pension benefits based upon such service credits.

Sec. 2. The Trustees shall provide participants and beneficiaries such information as is required by law.

Sec. 3. Amendment of Plan—The Pension Plan may be amended by the Trustees from time to time, provided

that such amendments comply with the applicable sections of the then applicable Internal Revenue Code, all applicable federal statutes and regulations, the contract articles creating the Pension Fund, and the purposes set forth in this Agreement. Additionally and not by way of limitation, the Trustees may amend the Pension Plan, in future, or retroactively, where they deem it necessary to maintain the continuation of the Fund's tax-exempt status or to preserve compliance with the then applicable Internal Revenue Code, applicable federal statutes, and any regulations or rulings issued with respect thereto. A copy of each amendment of the Pension Plan shall be adopted and filed by the Trustees as part of the records and minutes of the Trustees, and one copy thereof shall be distributed to the Union and to each Employer or Employer group signatory to this Trust Agreement.

ARTICLE VIII

SPENDTHRIFT CLAUSE

All benefit payments to participants or beneficiaries, if and when such payments shall become due, shall, except as to persons under legal disability, or as provided in this section and in Article IX, be paid to such participants or beneficiaries in person and shall not be grantable, transferable, or otherwise assignable in anticipation of payment thereof, in whole or in part, by the voluntary or involuntary acts of any such participants or beneficiaries, or by operation of law, and shall not be liable or taken for any obligation of such participants or beneficiaries. Upon receipt of written direction from any eligible recipient of monthly benefit payments, the Pension Fund will participate in an arrangement to make deductions from each monthly benefit payment, as authorized and directed by the recipient, and to transfer the amount of each such deduction to the Central States, Southeast and Southwest Areas Health and Welfare Fund as the recipient's monthly contribution to retain eligibility for coverage pursuant to the retiree benefit

plan established by that fund. This deduction-transfer arrangement is effective commencing October 1, 1988 and will continue, relative to each such recipient who authorizes and directs it, until the Pension Fund receives the recipient's written cancellation of such authority and direction (or the earlier termination of benefits). Any authority and direction to the Pension Fund by a recipient of monthly benefit payments, to make such deductions and transfers, is revocable at any time by the recipient.

ARTICLE IX

PAYMENTS TO PERSONS UNDER LEGAL DISABILITY

In case any benefit payments hereunder become payable to a person under legal disability, or to a person not adjudicated incompetent but, by reason of mental or physical disability, in the opinion of the Trustees, is unable to administer properly such payments, then such payments may be paid out by the Trustees for the benefit of such person in such of the following ways as they think best, and the Trustees shall have no duty or obligation to see that the payments are used or applied for the purpose or purposes for which paid:

(a) directly to any such person;

(b) to the legally appointed guardian or conservator of such person;

(c) to any spouse, parent, brother, or sister of such person for his welfare, support and maintenance;

(d) by the Trustees using such payments directly for the support, maintenance and welfare of any such person.

ARTICLE X

AMENDMENT OF AGREEMENT

It is anticipated that in the administration of this Trust conditions may arise that are not foreseen at the time of the execution of this Agreement, and it is the in-

tention of the parties that the power of amendment, which is hereinafter given, be exercised in order to carry out the provisions of this Trust, among which is to pay the largest benefits possible, which are consistent with the number of participants becoming and likely to become eligible for such payments, the amounts of funds which are available and which will probably become available, and the following of sound actuarial practice. Therefore, the power is given to the Trustees to amend this Agreement by majority, vote at any time and from time to time, and all parties to the Trust, and all persons claiming an interest thereunder, shall be bound thereby, and no participant, Employee member, beneficiary, or any other person shall have any vested interest or right in the Trust Fund or in any payment from the Trust Fund, except as provided by law. The Trustees have full authority to amend, repeal, add to, or take away any right of payment, retroactively or otherwise, that they deem proper for the preservation of this Trust; provided, however, in no event shall the Trust Fund be used for any purpose other than the purposes set forth in this Trust Agreement, and for the purposes of paying the necessary expenses incurred in the administration of this Trust. All amendments to this Agreement shall comply with applicable sections of the Internal Revenue Code, other applicable federal statutes and the Contract Articles creating the Pension Fund.

ARTICLE XI

TERMINATION OF TRUST

Sec. 1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

(a) In the event the Trust Fund shall be, in the opinion of the Trustees, inadequate to carry out the intent and purposes of this Agreement, or to meet the payments due or to become due under this Agreement to persons already drawing benefits.

(b) In the event there are no individuals living who can qualify as Employees hereunder.

Sec. 2. In the event this Trust shall terminate for any of the reasons set forth in Section 1 of this Article XI, the Trustees shall allocate the Trust Fund among participants and beneficiaries of the Pension Plan in the following order:

(a) First, to that portion of each individual's accrued benefit which is derived from the participant's contributions to the Pension Plan.

(b) Second, in the case of benefits payable as an annuity—

(1) In the case of the benefit of a participant or beneficiary which was in pay status as of the beginning of the 3-year period ending on the termination date of the Pension Plan, to each such benefit based on the provisions of the Pension Plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

(2) In the case of a participant's or beneficiary's benefit which would have been in pay status as of the beginning of the 3-year period ending on the termination date of the Pension Plan if the participant had retired prior to the beginning of the 3-year period and if his benefits had commenced (in the normal form of an annuity under the Pension Plan) as of the beginning of such period, to each such benefit based on the provisions of the Pension Plan (as in effect during the 5-year period ending on such date) under which such benefit would be the least.

For the purpose of subparagraph (1) the lowest benefit in pay status during a 3-year period shall be considered the benefit in pay status for such period.

(c) Third, to all other nonforfeitable benefits (other than benefits becoming nonforfeitable solely on account of termination of the Pension Plan) subject to the limitation that such nonforfeitable benefits shall not have an actuarial value which exceeds the actuarial value of a monthly benefit in the form of a life annuity commencing at age 65 equal to the lesser of—

(1) his average monthly gross income from his Employer during the 5 consecutive calendar year period during which his gross income from that Employer was greater than during any other such period with that Employer, or

(2) $750 multiplied by a fraction, the numerator of which is the contribution and benefit base (determined under Section 230 of the Social Security Act) in effect at the time the Pension Plan terminates and the denominator of which is the contribution and benefit base in effect in calendar year 1974.

(d) Fourth, to all other nonforfeitable benefits under the Pension Plan.

(e) Fifth, to all other benefits under the Pension Plan.

(f) If the assets available for allocation under any priority category (other than 2 (d) and 2 (e) above) are insufficient to satisfy in full the benefits of all individuals, the assets shall be allocated pro rata among such individuals on the basis of the present value as of the termination date of their respective benefits. To the extent funded, the rights of all participants to benefits accrued as of the date of termination are nonforfeitable.

ARTICLE XII

EXTENSION OF PLAN

Sec. 1. Extension of Trust—The Trustees are authorized to extend the coverage of this Agreement and Trust

to such other Employers and Employees as the Trustees shall agree upon, provided such Employers and Employees are required to conform to the terms and conditions of this Trust and to make the same rate of payments required of the Employers herein, for the same benefits.

Sec. 2. Reciprocity Agreements—The Trustees shall be authorized to enter into reciprocity agreements with other labor organizations and other pension funds in which such labor organizations participate.

Sec. 3. Merger—The Trustees shall have the power to merge with any other fund established for similar purposes as this Fund, under terms and conditions mutually agreeable to the respective Boards of Trustees. No participant's or beneficiary's accrued benefit will be lower immediately after the effective date of any such merger than the benefit immediately before that date.

ARTICLE XIII

VESTING OF RIGHTS

The Trustees shall establish standards for the vesting of benefits which conform to no less than the minimum standards required by law. No Employee or other person shall have any vested interest or right in the Trust Fund except as provided by the Trustees in conformance with applicable law.

ARTICLE XIV

MISCELLANEOUS

Sec. 1. The Trustees will issue a credit for contributions that have been billed to an Employer if (1) the related work history was reported by mistake of fact or law (other than a mistake about plan qualification or tax-exempt status pursuant to the Internal Revenue Code) as determined by the Trustees and (2) the request for credit is received within ten years after the related work history was billed. If an Employer no longer has

an obligation to contribute to the Fund and has satisfied his withdrawal liability assessment, the Trustees will refund contributions paid by an Employer to the Trust if (1) such contributions were made by a mistake of fact or law (other than a mistake about plan qualification or tax-exempt status pursuant to the Internal Revenue Code) as determined by the Trustees and (2) application therefor is received within ten years after payment of the contributions. An Employer shall not have a right to a refund of contributions made more than ten years prior to his application therefor. No interest shall be paid on any credits or refunds approved. In no event shall Employers, directly or indirectly, participate in the disposition of the Trust Fund or receive any benefits from the Trust Fund.

Sec. 2. The Union or the Employer may, at any time, demand of the Trustees an accounting with respect to any and all accounts upon agreement to pay necessary expenses thereof. The Trustees shall be entitled, at any time, to have a judicial settlement of their accounts and judicial determination of any questions in connection with the administration or distribution thereof. Any Trustee who has resigned, been removed from office, or not been reappointed shall execute all instruments necessary to transfer the Trust Fund.

Sec. 3. In the event any question or dispute shall arise as to the proper person or persons to whom any payments shall be made hereunder, the Trustees may withhold such payment until an adjudication of such question or dispute, satisfactory to the Trustees, in their sole discretion, shall have been made, or the Trustees shall have been adequaely indemnified against loss to their satisfaction.

Sec. 4. Non-payment by an Employer of any moneys due shall not relieve any other Employer from his obligation to make payment. In addition to any other remedies to which the parties may be entitled, an Employer

shall be obligated to pay interest on the moneys due to the Trustees from the date when the payment was due to the date when the payment is made, together with all expenses of collection incurred by the Trustees, including, but not limited to, attorneys' fees and such fees for late payment as the Trustees determine and as permitted by law. The interest payable by an Employer, in accordance with the preceding sentence, shall be computed and charged to the Employer at an annualized interest rate equal to two percent (2%) plus the prime interest rate established by Chase Manhattan Bank (New York, New York) for the fifteenth (15th) day of the month for which the interest is charged. Any judgment against an Employer entered on and after September 26, 1980, for contributions owed to this Fund shall include by mandate of the court the greater of (a) a doubling of the interest computed and charged in accordance with this section or (b) liquidated damages based on the unpaid contributions only (exclusive of interest) as determined by the court in the amount of 20% in accordance with the Multiemployer Pension Plan Amendments Act of 1980 and the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. 1132(g)(2)(C)(i) and (ii).

Sec. 5. Where used in this Agreement, words in the masculine shall be read and construed as in the feminine, and words in the singular shall be read and construed as though used in the plural, in all cases where such construction would so apply.

Sec. 6. The Article titles are included solely for convenience and shall, in no event, be construed to affect or modify any part of the provisions of this Agreement or be construed as part thereof.

Sec. 7. This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States. In all actions taken by the Trustees

to enforce the terms of this Trust Agreement, including but not limited to actions to collect delinquent contributions from employers or to conduct audits of contributing employers' records as authorized by Article III of this Agreement, the ten-year Statute of Limitations applicable to actions on written contracts in the State of Illinois shall apply.

Sec. 8. The method of computation of any employer withdrawal liability imposed by the Multiemployer Pension Plan Amendments Act of 1980 and payable to the Trust Fund shall be the Modified Basic Method (Two Pool Approach) as described in Section 4211 (c) (2) of the Employee Retirement Income Security Act of 1974, as amended, to be applied with a graduated increase in the extended period for determination of specific employer withdrawal liability allocations (5-year period in 1980, 6-year period in 1981, and so on until a 10-year period in 1985 and subsequent years), as described in Section 4211 (c) (5) (C) of the Employer Retirement Security Act of 1974, as amended, relative to any employer withdrawal after September 25, 1980.

Sec. 9. No person shall serve, or be permitted to serve, as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee adviser provider of goods or services or consultant of the Fund or as its representative in any capacity, or to serve in any capacity that involves decision making authority or custody or control of the moneys, funds or assets of the Fund, if such person has been convicted of: robbery, bribery, extortion, embezzlement, fraud, grand larceny, burglary, arson, a felony violation of Federal or State law involving substances defined in section 802 (6) of title 21 of the United States Code (hereinafter referred to as the "Code"), murder, rape, kidnapping, perjury, assault with intent to kill, any crime described in section 80a-9 (a) (1) of title 15 of the Code, a violation of any provision of the Employee Retirement Income Security Act of 1974, a violation of section 186 of title 29 of the Code, a violation

of chapter 63 of title 18 of the Code, a violation of sections 874, 1027, 1503, 1505, 1506, 1510, 1951 or 1954 of title 18 of the Code, a violation of the Labor-Management Reporting and Disclosure Act of 1959, or any felony involving abuse or misuse of such person's labor organization or employee benefit plan position or employment; or conspiracy to commit any such crimes; or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element; or a misdemeanor involving a breach of fiduciary responsibility. Upon conviction of any of the crimes described in the preceding sentence, such person shall immediately be disqualified from serving the Fund in any capacity described in the preceding sentence, and any such service shall immediately be terminated; provided that, upon final reversal of such conviction, such person, unless otherwise ineligible, shall thereafter be eligible to serve the Fund; and provided further that this disqualification shall continue in effect until ten (10) years after such conviction or after the end of imprisonment on such conviction, whichever is the later, unless, prior to the end of such ten-year period, in the case of a person so convicted or imprisoned, (a) his citizenship rights, having been revoked as a result of such conviction, have been fully restored, or (b) the United States Parole Commission, pursuant to applicable law, determines that such person's service would not be contrary to the best interests of the Fund.

ARTICLE XV

BENEFICIAL RIGHTS

No Employer or Union, or Employees, shall have any right, title or interest in or to the Trust Fund or any part thereof other than vesting under the Pension Plan except in accordance with applicable law. There shall be no pro rata or other distribution of any of the assets of the Fund as a result of any Union, Employer or group of Employees of Employers ceasing their participation in

this Fund for any purpose or reason, except as required by law.

ARTICLE XVI

SAVINGS CLAUSE

Should any provision of this Declaration of Trust be held to be unlawful, or unlawful as to any person or instance, such fact shall not adversely effect the other provisions herein contained or the application of such provision to any other person or instance, unless such illegality shall make impossible the functioning of the Pension Plan. No Trustee shall be held liable for any act done or performed in pursuance of any provision hereof prior to the time such act or provision shall be held unlawful by a court of competent jurisdiction.

APPENDIX B

REVISED AND AMENDED TRUST AGREEMENT FOR CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND

IMPORTANT

This Trust Agreement for the Central States, Southeast and Southwest Areas Health & Welfare Fund was first executed on March 14, 1950, which, in turn authorized creation of the Central States, Southeast and Southwest Areas Health & Welfare Fund. The Trust Agreement has since been amended on numerous occasions. The most recent amendments to the Trust Agreement were adopted on July 21, 1982. This version incorporates all amendments to the Trust Agreement as of that date.

REVISED AND AMENDED TRUST AGREEMENT FOR CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND

This AGREEMENT and DECLARATION of TRUST, made and entered into this 14th day of March, 1950, by and between CENTRAL CONFERENCE OF TEAMSTERS, SOUTHERN CONFERENCE OF TEAMSTERS, and their affiliated Local Unions, hereinafter referred to collectively as the "UNION" and the SOUTHEASTERN AREA MOTOR CARRIERS LABOR RELATIONS ASSOCIATION; SOUTHWEST OPERATORS ASSOCIATION; and MOTOR CARRIERS EMPLOYERS CONFERENCE-CENTRAL STATES; for and on behalf of themselves, their constituent members, and such other Employers who are or may become parties hereto, hereinafter collectively referred to as the "EMPLOYER" and the individual Trustees, hereinafter referred to as the "TRUSTEES" selected as hereinafter described, accepting the Trust obligations herein and declared:

WITNESSETH:

WHEREAS, the Union and the Employer believe that it is in the best interest of the Employees of such Employer represented by the Union, and the families and dependents of such Employees, to provide for health and welfare benefits and for that purpose to establish a Trust Fund as hereinafter provided; and

WHEREAS, the Union and the Employer have heretofore entered into collective bargaining agreements under the terms of which it is provided that the Employer shall contribute certain agreed-upon sums of money therein set forth to a Health and Welfare Fund, which shall be known as the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND; and

WHEREAS, Employee Trustees and Employer Trustees have been designated as the Trustees of the Trust in accordance with the provisions of such Agreement.

NOW THEREFORE, for and in consideration of the premises and of the mutual covenants and agreements herein contained, the Union and the Employer hereby accept and adopt all of the provisions herein contained, and the Trustees declare that they will receive and hold the contributions and any other money or property which may come into their hands as Trustees (all such contributions, money and property being hereinafter referred to as "the Trust Fund"), with the powers and duties, uses, and purposes as hereinafter set forth, to wit:

ARTICLE

1. DEFINITION OF TERMS.

SECTION

1. Employer—The term "Employer" as used herein shall mean any association or individual Employer who has duly executed and is bound by a collective bargaining agreement with the Union, or any employer not presently a party to such collective bargaining agreement who satisfies the requirements for participation as established by the Trustees and agrees to be bound by this Agreement.

SECTION

2. Union—The term "Union" as used herein shall mean the CENTRAL CONFERENCE OF TEAMSTERS and SOUTHERN CONFERENCE OF TEAMSTERS and their affected affiliated Local Unions, and such other unions as the Trustees may agree upon.

SECTION

3. Employee—The term "Employee" as used herein shall include:

(a) A person who is employed under the terms and conditions of a collective bargaining agreement entered into between an Employer as herein defined and a Union as herein defined, and on whose behalf payments are required by such collective bargaining agreement or applicable law to be made to the Fund by the Employer; or

(b) All persons employed by the Union, upon being proposed by the Union and after acceptance by the Trustees; and as to such Union personnel the Union shall be considered as Employer, solely for the purposes of contributions, within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits; or

(c) All persons employed by the Central States, Southeast and Southwest Areas Health & Welfare Fund or by the Central States, Southeast and Southwest Areas Pension Fund upon acceptance by the Trustees; and as to such Trust personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of this Agreement and Declaration of Trust and shall, on behalf of such personnel, make payments to the Trust at the times and at the rate of payment equal to that made by any other Employer who is a party to the Trust for the same benefits;

(d) All persons who are Trustees of Central States, Southeast and Southwest Areas Health and Welfare Fund or Central States Southeast and Southwest Areas Pension Fund upon acceptance by the Trustees, as hereinafter defined; and on behalf of such persons who are Trustees, their Employers shall make or be presently required to make contributions to the Trust at the times and at the rate of payment equal to that required by any other Employer who is a party to the Trust for the same benefits.

(e) In all instances, the common law test, or the applicable statutory definition, of master-servant relationship shall control employee status;

(f) The continuation of employee status once established shall be subject to such reasonable rules as the Trustees may adopt according to law.

SECTION

4. Trustees—The term "Trustees" or "Board" as used herein shall mean the Trustees designated in this Agreement and Declaration of Trust, together with their successors designated and appointed in accordance with the terms of this Agreement.

SECTION

5. Trust Fund or Fund—The term "Trust Fund" or "Fund" as used herein shall refer to all property of whatever nature which shall be in said Trust created by this Agreement.

SECTION

6. Employer Contributions—The term "Employer Contributions" as used herein shall mean payments made by Employers to the Trust Fund herein created.

ARTICLE

II. CREATION OF TRUST FUND AND BOARD OF TRUSTEES.

SECTION

1. Designation—The Union and the Employer hereby create and establish, with the Trustees herein provided for, a Trust to be known as the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND which shall be comprised of assets derived from Employer contributions made pursuant to the collective bargaining agreement between the parties (plus any additional sum or sums, from Employer contributions which may hereafter be agreed upon by the Employers and the Union set forth in written collective bargaining agreements), together with all insurance and annuity contracts (including dividends, refunds, or other sums payable to the Trustees on account of such insurance and annuity contracts) and all investments made and held by the Trustees on account of such insurance and annuity contracts, all investments made and held by the Trustees, all moneys received by the Trustees as contributions or as income from investments made and held by the Trustees or otherwise, and any other property received and held by the Trustees for the uses, purposes, and trusts set forth in this Agreement and Declaration of Trust, where any of the foregoing is derived from the Employer contributions.

SECTION

2. Board of Trustees—There is hereby created a Board of Trustees consisting of four (4) persons representative of the Employers and four (4) persons representative of the Employees. The Employer Trustees shall be designated as follows: one (1) Trustee shall be jointly designated by Southwest Operators Association and Southeastern Area Motor Carriers Labor Relations Association; one (1) Trustee shall be designated by Cartage Employers Management Association; and two (2) Trustees shall be designated by Motor Carriers Employers Conference—Central States. The Employee Trustees shall be designated jointly by the Union, as defined in Article I, Section 2 of this Agreement.

SECTION

3. Term of Trustees—Each Trustees shall serve as such Trustee until he shall die, become incapable of acting hereunder, resign, become unqualified for the position under applicable law, or be removed as herein provided.

SECTION

4. Manner of Acting in Event of Deadlock—In the event a deadlock develops between the Employer and Employee Trustees, or between the Trustees, the Trustees shall appoint a neutral party empowered to break such deadlock within a reasonable length of time. Such neutral party may be appointed in advance of any such deadlock. In the event the Trustees are unable to agree upon a neutral party, or in the event such neutral party is unable to act, either the Employer or the Employee Trustees may petition the District Court of

the United States for the Northern District of Illinois, Eastern Division, for appointment of a neutral person, as provided in Section 302(c) of the Labor Management Relations Act of 1947, as amended.

SECTION

5. Vacancy in Board of Trustees—In case of vacancies by death, legal incapacity, resignation or otherwise of the Employer Trustees or Employee Trustees, a successeor thereto shall be appointed as provided in Article II, Section 2, hereof. In the absence of action by the particular party within thirty (30) days following vacancy, and assuming that there are *two* Trustees who are representative of the Employer group, such Trustees may appoint a *third* Trustee to fill the vacancy. A similar right shall be accorded to the Trustees representing the Union. Any Trustee or Trustees shall have the right to resign on written notice to the remaining Trustees, and to the Executive Director; said notice shall specify the effective date of such resignation, which shall be no later than fifteen (15) days after said notice is received by the Executive Director, except that said resignation shall in any event become effective no later than appointment of, and acceptance of appointment by, a Successor Trustee, in accordance with Article II, Section 7 of this Agreement.

SECTION

6. Removal of Trustees—Any Employer Trustee may be removed, with or without cause, at any time by the Employer Association or Group appointing such Employer Trustee; in the event of such removal of such Employer Trustee, the Employer

Association or Group removing such Trustees shall appoint a Successor Trustee. Any Employee Trustee may be removed, with or without cause, at any time by the Union. The Trustees shall also have the authority and duty to act to remove a Trustee holding office in violation of law.

SECTION

7. Designation of Successor Trustee—In the event of a vacancy under either Section 5 or 6 above, the Successor Trustee shall be designated in writing by the appointing authority, and such Successor Trustee shall accept such appointment in writing in a form satisfactory to the Trustees. Both the designation and acceptance shall be filed with the Executive Director of the Fund.

SECTION

8. Limitation of Liability of Trustees—No Trustee shall be liable or responsible for any acts or defaults of any co-Trustee, any other fiduciary, any party-in-interest or any other person except in accordance with applicable law.

SECTION

9. Office of the Fund—The sole and principal office of the Fund shall be in Chicago, Illinois, for the transaction of business of the Fund, the exact location of which is to be made known to the parties interested in such Fund. As such office, and at such other places as may be required by law, there shall be maintained all, or any of, the books and records pertaining to the Fund and its administration.

SECTION

10. No one is Agent Without Written Authority—No individual or person may act as agent for the

Fund unless specifically authorized in writing by the Trustees. No Employer or Union nor any representative of any Employer or Union, in such capacity, is authorized to interpret the Health and Welfare Plan, nor can any such person act as agent of the Trustees. Only the Board of Trustees is authorized to interpret the Health and Welfare Plan within the scope of its authority.

ARTICLE

III. CONTRIBUTIONS AND COLLECTIONS

SECTION

1. Amount of Contributions—Each Employer shall make continuing and prompt payments to the Trust Fund as required by the applicable collective bargaining agreement between the parties. The obligation to make such contributions shall continue during periods when the collective bargaining agreement is being negotiated, but such contributions shall not be required in case of strike after contract termination unless the parties mutually agree otherwise.

SECTION

2. Time of Payment—The Trustees shall, by regulation, fix the time of payment for contributions and shall send a copy of such regulations to each Employer required to contribute.

SECTION

3. Receipt of Payment and Other Property of Trust —The Trustees are hereby designated as the persons to receive the payments heretofore or hereafter made by the Employers to the Trust Fund, and the Trustees are hereby vested with all right,

title and interest in and to such moneys and all interest accrued thereon, and are authorized to receive and be paid the same. The Trustees agree to receive all such payments, deposits, moneys, insurance and other assets and properties referred in Article II and this Article, and to hold same in Trust hereunder for the uses and purposes of the Trust herein created.

SECTION

4. Collection and Enforcement of Payment—The Trustees, or such committee of the Trustees as the Board of Trustees shall appoint, or the Executive Director when directed by such committee or by the Trustees, shall have the power to demand and collect the contributions of the Employers to the Fund. Said Board of Trustees shall take such steps, including the institution and prosecution of, and intervention in, any legal proceedings as the Trustees in their discretion deem in the best interest of the Fund, to effectuate the collection or preservation of contributions or other amounts which may be owed to the Trust Fund without prejudice, however, to the rights of the Union to take whatever steps which may be deemed necessary for such purpose. The Trustees are authorized to receive all Employer contributions and apply such contributions in the best interest of the Fund. Nothing herein shall give any Employer the right to designate how any contributions shall be applied.

SECTION

5. Production of Records—Each employer shall promptly furnish to the Trustees, upon reasonable demand, the names and current addresses of its Employees, their Social Security numbers, the hours worked by each Employee and such other

information as the Trustees may reasonably require in connection with the administration of the Trust. The Trustees may, by their representatives, examine the pertinent records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by the Trustees in connection with the proper administration of the Trust. All Employers shall annually furnish to the Trustees, if requested by them, a statement showing whether:

(a) the organization is a corporation and the names of all of its officers;

(b) if not a corporation, a certificate stating that it is either a partnership or an individual proprietorship and the names of the partners or the name of the individual proprietor.

The Union will comply with any reasonable request of the Trustees to examine those records of the Union which may indicate the employment record of any Employee whose status is in dispute. The names and addresses of participants and beneficiaries are confidential information not to be disclosed by the Trustees except as required by an order of a court of competent jurisdiction, except where necessary for determination of benefits in accordance with the provisions of this Trust Agreement, or as required by law.

ARTICLE

IV. POWERS AND DUTIES OF TRUSTEES

SECTION

1. The Trustees shall have authority to control and manage the operation and administration of the Trust in accordance with applicable law.

SECTION

2. The Trustees shall hold, manage, care for, and protect the Trust Fund and collect the income therefrom and contributions thereto.

SECTION

3. (a) The Trustees shall procure, from such solvent insurance company or companies as it may designate, a group health, accident and life policy or policies including, in its discretion, dependent coverages; Trustees may also purchase, lease, manage, or contract for any other programs or facilities which are to be used or devoted to the general health and welfare of the Employees and their families, including, without limitation, participation in, or adoption of, privately or governmentally sponsored health programs and also including self-insurance. The amounts of such policy or policies, or purchases or programs shall be within the discretion of the Trustees. The Trustees shall have the power, in their sole discretion, to invest and reinvest any excess principal and income of the Trust Fund over the requirements for insurance premiums, contracts, expenses and other disbursements, in such securities, common and preferred stock, mortgages, notes, retail estate or other property as shall be permissible investments for Trustees in accordance with applicable law, and may sell or otherwise dispose of such securities or property at any time and from time to time as they see fit. The Trustees shall also have power (in addition to and in limitation of common law and statutory authority) to invest in any stocks, bonds, or other property, real or personal, including improved or unimproved real estate and equity interests in

real estate and also including open-ended diversified investment companies of the type commonly known as mutual funds, where such an investment appears to the Trustees in their discretion and in accordance with their fiduciary obligations to be in the best interest of the Fund and its participants and beneficiaries, judged by then present day business conditions and standards, and to exercise in respect to any stocks, bonds, or other property, real or personal, held by them as Trustees, all such rights, powers and privileges as might be lawfully exercised by any person owning similar stocks, bonds, or other property in his own right.

(b) The Trustees are further authorized, in their discretion, to cancel any policy in force and to substitute other or additional policies if, in their discretion, such course is desirable, provided, however, that any such change prior to the anniversary date of the then existing policy or policies or of the insurance carrier may be made only by unanimous action of the Board of Trustees. Changes of insurance carriers or the extent of insurance coverage on the anniversary date of an existing policy may be made by a majority vote of the Trustees.

(c) The Trustees, if they so desire, are authorized to allocate only to a committee of Trustees or to one or more "Investment Managers" as defined in Section 3 (38) of the "Employee Retirement Income Security Act of 1974", appointed by the Trustees such duties and responsibilities with respect to the Trust assets, including the responsibility to invest or reinvest such assets, as they shall specify in such

allocation or appointment. In connection with any such appointment, the Trustees shall from time to time adopt appropriate investment policies and also may delegate to such Investment Manager the right to custody and possession of the Trust assets, or any part thereof. Any such appointment may be revoked at any time by notice in writing from the Trustees to such investment Manager.

SECTION

4. All Trust Funds not invested shall be deposited by the Trustees in such depository or depositories as the Trustees shall from time to time select, and any such deposit or deposits, or disbursements therefrom, shall be made in the name of the Trust in the manner designated by the Trustees and upon the signature(s) designated by the Trustees.

SECTION

5. The Trustees shall keep true and accurate books of account and a record of all their transactions.

SECTION

6. The Trustees shall engage one or more independent qualified public accountants and enrolled actuaries to perform all services required by and in accordance with applicable law and such other services as the Trustees deem necessary.

SECTION

7. The Trustees, to the extent permitted by applicable law, shall incur no liability in acting upon any instrument, application, notice, request, signed letter, telegram, or other paper or document believed by them to be genuine and to contain a true statement of facts, and to be signed by the proper person.

SECTION

8. Any Trustee, to the extent permitted by applicable law, may rely upon any instrument in writing purporting to have been signed by a majority of the Trustees as conclusive evidence of the fact that a majority of the Trustees have taken the action stated to have been taken in such instrument.

SECTION

9. The Trustees are hereby authorized to formulate and promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust, provided the same are not inconsistent with the terms of the Agreement, and the Articles in the Central States, Southeast and Southwest Areas Agreements creating the Health and Welfare Fund. All rules and regulations adopted by action of the Trustees for the administration of the Trust Fund shall be binding upon all parties hereto, all parties dealing with the Trust, and all persons claiming any benefits hereunder.

SECTION

10. Any Successor Trustee appointed in accordance with the provisions of this Agreement, upon accepting in writing the terms of this Trust, in a form satisfactory to the Trustees, shall be vested with all of the rights, powers and duties of his predecessor.

SECTION

11. (a) The Trustees may assign, from time to time, various administrative matters to such committees and subcommittees of Trustees, experts, or other individuals or organizations as

they may deem appropriate or necessary in their sole discretion. The Trustees may also assign and delegate, from time to time, specified Trustee responsibilities to committees and subcommittees of Trustees, including review of and recommendation to the Board of Trustees concerning proposals related to loans and other investments by the Fund, including review of and authorized final action (subject to review pursuant to established procedures) upon claims for health and welfare and other benefits administered by the Fund, and including such other responsibilities as the Trustees determine. Committees and subcommittees of Trustees shall consist of an equal number of Employer and Employee Trustees. Only the Trustees shall have the authority to approve, modify the terms of, or terminate any loan. The Trustees, from time to time as appropriate, shall determine and modify the loan and investment policies of the Fund, including the diversification of investments so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so.

(b) The Trustees may establish a Public Advisory Board consisting of four (4) persons, two (2) to be designated by a majority of the Employer Trustees and two (2) to be designated by a majority of the Employee Trustees. Such Public Advisory Board, if established, shall act solely in an advisory and consultant capacity and shall not have or exercise any fiduciary powers, responsibilities or duties. None of the members of said Board, individually or collectively, shall have or exercise any discretionary authority or discretionary control respecting management of the

Fund, or have or exercise any authority or control respecting management or disposition of any assets of the Fund, or render any investment advice for any fee or other consideration, or have or exercise any discretionary authority or discretionary responsibility in the administration of the Fund. The Trustees shall establish procedures for submission of matters to the Public Advisory Board, if established, for advice and consultation by said Board. Any payment of compensation and expenses for members of said Board shall be determined by the Trustees.

(c) The Trustees shall appoint an Executive Director, who shall, subject to the directions of the Trustees with respect thereto, be responsible to the Trustees and/or any committee thereof for coordinating the administration of the Fund's assets, office and personnel, for the coordination and administration of accounting and actuarial services, for the preparation of all reports and other documents required to be filed or issued in accordance with law, for the performance of ministerial duties in conformance therewith, and for such other duties which shall be assigned to him by the Trustees. The Executive Director shall be the custodian of the documents and other records of the Fund.

SECTION

12. No party dealing with the Trustees shall be obligated:

(a) to see the application to the trust purposes, herein stated, of any money or property belonging to the Trust Fund, or

(b) to see that the terms of this Agreement have been complied with, or

(c) to inquire into the necessity or expediency of any act of the Trustees.

Every instrument executed by the Trustees shall be conclusive evidence in favor of every person relying thereon:

(1) that at the time of the delivery of said instrument the Trust was in full force and effect,

(2) that the instrument was executed in accordance with the terms and conditions of this Agreement, and

(3) that the Trustees were duly authorized and empowered to execute the instrument.

SECTION

13. The Trustees shall, by regulation, establish rules relating to payments of contributions by Employers for Employees during periods of such Employees' illness or disability and related matters, but not contrary to applicable collective bargaining agreements.

SECTION

14. The Trustees are hereby empowered, in addition to such other powers as are set forth herein or conferred by law:

(a) To enter into any and all contracts and agreements for carrying out the terms of this Agreement and Declaration of Trust and for the administration of the Trust Fund, and to do all acts as they, in their discretion, may deem necessary or advisable, and such contracts and agreements and acts shall be bind-

ing and conclusive on the parties hereto and on the Employees involved.

(b) To keep property and securities registered in the names of the Trustees or in the name of any other individual or entity duly designated by the Trustees.

(c) To establish and accumulate as part of the Trust Fund a reserve or reserves, adequate in the opinion of the Trustees, and in accordance with applicable law, to carry out the purposes of such Trust.

(d) To pay out of the funds of the Trust all real and personal property taxes, income taxes, and other taxes of any and all kinds levied or assessed under existing or future laws upon or in respect to the Trust Fund, or any money, property, or securities forming a part thereof.

(e) To do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder.

(f) To sell, exchange, lease, convey, mortgage or dispose of any property, whether real or personal, at any time forming a part of the Trust Fund upon such terms as they may deem proper, and to execute and deliver any and all instruments of conveyance, lease, mortgage and transfer in connection therewith.

SECTION

15. The Trustees shall be entitled to receive reasonable compensation for services rendered, and the reimbursement of expenses properly and actually incurred, in the performance of their duites to the Fund; except that no Trustee who already receives

full-time pay from an Employer or an association of Employers or from the Union shall receive compensation from the Fund, except for reimbursement of expenses properly and actually incurred.

SECTION

16. The Trustees shall use and apply the Trust Fund for the following purposes:

(a) To pay or provide for—

(1) the payment of all reasonable and necessary expenses of collecting the contributions and administering the affairs of this Trust, including the employment of such administrative, legal, actuarial, expert, and clerical assistance as may be reasonably necessary.

(2) the purchasing, owning or leasing of such premises as may be necessary for the operation of the affairs of the Trust, and

(3) the purchase or leasing of such materials, supplies and equipment as the Trustees, in their discretion, find necessary or appropriate to the performance of their duties.

(b) To pay or provide for the payment of health and welfare and related benefits to eligible Employees in accordance with the terms, provisions and conditions of the Health and Welfare Plan to be formulated and agreed upon hereunder by the Trustees.

SECTION

17. The Trustees, by majority action, shall have the power to construe the provisions of this Agreement

and the terms and regulations of the Health and Welfare Plan: and any construction adopted by the Trustees in good faith shall be binding upon the Union, Employees and Employers.

SECTION

18. The Trustees, by resolution, shall provide for fidelity bonds, in such amounts as they may determine, for their employees and for the Trustees, the cost of which shall be paid by the Fund. The Trustees may purchase insurance coverage to protect the Fund from liability arising out of any error or omission of any Trustee or employee of the Trust, in accordance with applicable law, the cost of which policy shall be paid by the Fund.

SECTION

19. The Trustees shall provide participants and beneficiaries such information as is required by law.

ARTICLE

V. CONTROVERSIES AND DISPUTES

SECTION

1. In any controversy, claim, demand, suit at law, or other proceeding between any participant, beneficiary, or any other person and the Trustees, the Trustees shall be entitled to rely upon any facts appearing in the records of the Trustees, any instruments on file with the Trustees, with the Union or with the Employers, any facts certified to the Trustees by the Union or the Employers, any facts which are of public record, and any other evidence pertinent to the issue involved.

SECTION

2. All questions or controversies, of whatsoever character, arising in any manner or between any par-

ties or persons in connection with the Fund or the operation thereof, whether as to any claim for any benefits preferred by any participant, beneficiary, or any other person, or whether as to the construction of the language or meaning of the rules and regulations adopted by the Trustees or this instrument, or as to any writing, decision, instrument or accounts in connection with the operation of the Trust Fund or otherwise, shall be submitted to the Trustees, or to a committee of Trustees, and the decision of the Trustees or of such committee thereof shall be binding upon all persons dealing with the Fund or claiming any benefit thereunder.

SECTION

3. The Trustees may in their sole discretion, compromise or settle any claim or controversy in such manner as they think best, and any decision made by the Trustees in compromise or settlement of a claim or controversy, or any compromise or settlement agreement entered into by the Trustees, shall be conclusive and binding on all parties interested in this Trust.

ARTICLE

VI. OPERATION OF BOARD OF TRUSTEES

SECTION

1. Officers—The Board of Trustees shall at each meeting designate a presiding Chairman. The Chairmanship shall be rotated between the Employee Trustees and the Employer Trustees.

SECTION

2. Quorum—A Quorum of the Trustees for the transaction of business, except as otherwise specifically

provided herein, shall consist of at least four (4) Trustees, two (2) of whom shall be representative of the Employers and two (2) of whom shall be representative of the Employees. A quorum of a committee shall consist of a majority of the members thereof. Upon each matter voted upon at any meeting of the Trustees, the Employer Trustees and the Employee Trustees shall each have the same number of votes based upon the larger number of Employee or Employer Trustees in attendance, as the case may be; provided, however, that the vote or votes cast by each such Trustee shall be cast as an individual Trustee and not as a part of a block. All actions of the Trustees at meetings shall be by majority vote of those present and voting, a quorum being present. No Trustee may vote by proxy.

SECTION

3. Records of Trustee Action—The Trustees shall make and maintain a record of the actions of the Trustees taken at any meeting thereof. Any action, which may be taken at a meeting of the Trustees if a consent in writing, setting forth the action so taken, should be distributed to all of the Trustees and should be signed by five (5) of the Trustees, said written consent evidencing the substance of the action of the Trustees so taken.

SECTION

4. Reports—All reports required by law to be signed by one or more Trustees shall be signed by all of the Trustees, provided that all of the Trustees may appoint in writing one or more of their number to sign such report on behalf of the Trustees.

SECTION

5. Power to Act in Case of Vacancy—No vacancy or vacancies in the Board of Trustees shall impair the power of the remaining Trustees, acting in the manner provided by this Agreement, to administer the affairs of the Trust notwithstanding the existence of such vacancy or vacancies.

SECTION

6. Expenses—All proper and necessary expenses incurred by any former or incumbent Trustee, including costs of defense in litigation arising out of the Trusteeship of this Fund, and also including costs incurred by any former or incumbent Trustee in providing testimony or information about administration of this Fund in any investigation, trial or other proceeding, shall be paid out of the Trust Fund, as a matter of right of any such former or incumbent Trustee, to the extent permittee by applicable law. As used in the preceding sentence, the term "costs" includes, but is not limited to, reasonable attorneys' fees.

SECTION

7. Meetings—Regular meetings of the Trustees shall be held on the Tuesday immediately before the third Wednesday of each month, and on such other days as the Trustees determine, except that such regular monthly meeting date may be changed or postponed either by the Board of Trustees in regular meeting assembled or otherwise by written decision signed by a majority of the Trustees. Any two (2) Trustees may request a meeting of the Trustees at any time by notifying the Executive Director who shall arrange the time and place thereof. Written notices of meetings may be delivered in person, by mail, or by telegram. Meetings of the Trustees may also be held at any time without notice if all the Trustees consent thereto.

ARTICLE

VII. INCLUSION OF OTHER EMPLOYERS UNDER PLAN

SECTION

1. Extension of Trust—The Trustees are authorized to extend the coverage of this Agreement and Trust to such other Employers and Employees as such Trustees shall agree upon, provided such parties are required to conform to the terms and conditions of the Trust and to make the same rate of payments required of the Employers herein for the same benefits.

SECTION

2. Reciprocity Agreements—The Trustees shall be authorized to enter into reciprocity agreements with other labor organizations and other welfare funds in which such labor organizations participate.

SECTION

3. Merger—The Trustees shall have the power to merge with any other fund established for similar purposes as this Fund, under terms and conditions mutually agreeable to the respective Boards of Trustees.

ARTICLE

VIII. BENEFICIAL RIGHTS

SECTION

1. No Right, Title, or Interest of Employers and Union —No Employer or Union, or Employees, shall have the right, title or interest in or to the Trust

Fund or any part thereof. There shall be no pro-rata or other distribution of any of the assets of the Fund as a result of any Union, Employer or Group of Employees or Employers ceasing their participation in this Fund for any purpose or reason, except as required by law.

SECTION

2. Limitations upon Beneficial Rights of Employees— No Employee, participant or any beneficiary of a participant shall have any right, title or interest in or to the Trust Fund or any part thereof, provided, however, that any participant who shall be covered by an insurance plan, or his beneficiaries under such plan, shall be entitled to the benefits in the forms and amounts and subject to the terms and conditions of such insurance plan and of this Trust; provided further, however, that the benefits shall be free from the interference and control of any creditor, and no benefits shall be subject to any assignment or other anticipation, nor to seizure or to sale under any legal, equitable or any other process, and in the event that any claim or benefit shall, because of any debt incurred by or resulting from any other claim or liability against any participant or beneficiary, by reason of any sale, assignment, transfer, encumbrance, anticipation or other disposition made or attempted by said participant or beneficiary, or by reason of any seizure or sale or attempted sale under any legal, equitable or other process, or in any suit or proceeding become payable, or be liable to become payable to any person other than the participant or beneficiary for whom the same is intended, as provided herein, pursuant hereto, the Trustees shall have power to withhold payment of such benefit to such participant or beneficiary until such assignment, transfer, encumbrance, anticipa-

tion or other disposition, writ or legal process is cancelled or withdrawn in such manner as shall be satisfactory to the Trustees. Until so cancelled or withdrawn, the Trustees shall have the right to use and apply the benefits in a manner which to the Trustee may seem best, directly for the support and maintenance of such participant or beneficiary.

SECTION

3. Optional Benefits Prohibited—No Employee shall have the right, privilege or option to receive, instead of the benefits provided hereunder:

(a) Any part of the contributions payable by Employers under this Agreement;

(b) A cash consideration either upon termination of the plan or his withdrawal from it either voluntarily or through severance of employment with the particular Employer;

(c) The cash surrender value of any policy of insurance in lieu of the benefits provided in said policy.

ARTICLE

IX. TERMINATION OF PLAN

SECTION

1. This Trust shall cease and terminate upon the happening of any one or more of the following events:

(a) In the event the Trust Fund shall be, in the opinion of the Trustees, inadequate to carry out the intent and purpose of this Agreement, or to meet the payments due or to be-

come due under this Agreement to persons already drawing benefits.

(b) In the event there are no individuals living who can qualify as Employees hereunder.

SECTION

2. Distribution on Termination—In the event this Trust is terminated, the Trustees are authorized and empowered to dispose of the funds remaining in their hands in accordance with any Plan conforming to the purposes of the Employee Retirement Income Security Act of 1974 and the objective of this Agreement.

ARTICLE

X. AMENDMENT OF AGREEMENT

SECTION

1. It is anticipated that in the administration of this Trust conditions may arise that are not foreseen at any time of the execution of this Agreement, and it is the intention of the parties that the power of amendment, which is hereinafter given, be exercised in order to carry out the provisions of this Trust, among which is to pay the largest benefits possible, which are consistent with the number of members becoming and likely to become eligible for such payments, the amounts of funds which are available and which will probably become available, and the following of sound actuarial practice. Therefore, the power is given to the Trustees to amend this Agreement by majority vote, at any time and from time to time, and all parties to the Trust, and all persons claiming an interest thereunder shall be bound thereby, and no participant, Employee member, beneficiary, or any other person shall have any vested inter-

est or right in the Trust Fund or in any payment from the Trust Fund, except as provided by law. The Trustees have full authority to amend, repeal, add to, or take away any right of payment, retroactively or otherwise, that they deem proper for the preservation of this Trust; providing, however, in no event shall the Trust Fund be used for any purpose other than the purpose set forth in this Trust Agreement, and for the purposes of paying the necessary expenses incurred in the administration of this Trust. All amendments to this Agreement shall comply with applicable sections of the then applicable Internal Revenue Code, applicable federal statutes, and the Contract Articles creating the Health and Welfare Fund.

SECTION

2. Limitations upon Amendments—No amendment to this Trust Agreement shall permit the return to, or payment of the Fund or any part thereof, to any Employer, except the return of an overpayment of a contribution by mistake of fact, but only if the contribution is returned within one year after the payment of such contribution; or permit the administration of this Trust by a Board of Trustees other than one composed of an equal number of Employer Trustees and of Employee Trustees to administer the Trust; or permit the diversion of the Trust Fund or any part thereof from the purposes of the Trust.

ARTICLE

XI. MISCELLANEOUS

SECTION

1. In no event shall the Employers, directly or indirectly, receive any refund on contributions made

by them to the Trust, except a refund of contributions made by a mistake of fact determined by the Trustees if application therefor is received within thirty (30) days after payment of the contributions. In no event shall the Employers, directly or indirectly, participate in the disposition of the Trust Fund or receive any benefits from the Trust Fund.

SECTION

2. The Union or the Employer may, at any time, demand of the Trustees an accounting with respect to any and all accounts upon agreement to pay necessary expenses thereof. The Trustees shall be entitled, at any time, to have a judicial settlement of their accounts and judicial determination of any questions in connection with their duties and obligations under this Trust, or in connection with the administration or distribution thereof. Any Trustee who has resigned, been removed from office, or not been reappointed shall execute all instruments necessary to transfer the Trust Fund.

SECTION

3. In the event any question or dispute shall arise as to the proper person or persons to whom any payments shall be made hereunder, the Trustees may withhold such payment until an adjudication of such question or dispute, satisfactory to the Trustees, in their sole discretion, shall have been made, or the Trustees shall have been adequately indemnified against loss to their satisfaction.

SECTION

4. Non-payment by an Employer of any moneys due shall not relieve any other Employer from his ob-

ligation to make payment. In addition to any other remedies to which the parties may be entitled, an Employer shall be obligated to pay interest in the moneys due to the Trustees from the date when the payment was due to the date when the payment is made, together with all expenses of collection incurred by the Trustees, including, but not limited to, attorneys' fees and such fees for late payment as the Trustees determine and as permitted by law. The interest payable by an Employer, in accordance with the preceding sentence, shall be computed and charged to the Employer at the prime interest rate established by Chase Manhattan Bank (New York, New York) for the fifteenth (15th) day of the month for which the interest is charged. Any judgment against an Employer entered on and after September 26, 1980, for contributions owed to this Fund shall include by mandate of the court the greater of (a) a doubling of the interest and charged in accordance with this section or (b) liquidated damages based on the unpaid contributions only (exclusive of interest) as determined by the court in the amount of 20% inaccordance with the Multiemployer Pension Plan Amendments Act of 1980, the Employee Retirement Income Security Act, 29 U.S.C. 1132 (g)(2)(C)(i) and (ii).

SECTION

5. Where used in this Agreement, words in the masculine shall be read and construed as in the feminine, and words in the singular shall be read and construed as though used in the plural, in all cases where such construction would so apply.

SECTION

6. The Article titles are included solely for convenience and shall, in no event, be construed to affect

or modify any part of the provisions of this Agreement or be construed as part thereof.

SECTION

7. This Agreement shall in all respects be construed according to and governed by the laws of the State of Illinois, including but not limited to the laws applicable to the rate of interest in the State of Illinois, except as such laws may be preempted by the laws and regulations of the United States.

ARTICLE

XII. SAVINGS CLAUSE

Should any provision of this Declaration of Trust be held to be unlawful, or unlawful as to any person or instance, such fact shall not adversely affect the other provisions herein contained or the application of said provisions to any other person or instance, unless such illegality shall make impossible the functioning of the Health and Welfare Plan. No Trustee shall be held liable for any act done or performed in pursuance of any provision hereof prior to the time such act or provision shall be held unlawful by a court of competent jurisdiction.

APPENDIX C

CENTRAL STATES
SOUTHEAST AND
SOUTHWEST AREAS
HEALTH AND WELFARE AND PENSION
FUNDS

PARTICIPATION AGREEMENT

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS
PENSION FUND/HEALTH AND WELFARE FUND
9377 WEST HIGGINS ROAD
ROSEMONT, IL 60018-4938
PHONE: 2(708) 518-9800

THIS AGREEMENT made and entered into on the ——— day of ——— by and between the Employer and the Union signatory hereto by their duly authorized representatives.

WITNESSETH:

WHEREAS, the Union and the Employer have entered into a collective bargaining agreement which provides for participation in the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND/OR HEALTH AND WELFARE FUND in order to obtain retirement and/or health benefits for Employees (classification: ——————) represented by the Union and employed by the Employer.

NOW, THEREFORE, for and in consideration of the promises and mutual covenants herein contained and subject to the written acceptance of the parties as participants by said Trust Fund(s), the Union and the Employer hereby agree as follows:

1. The Union and the Employer agree to be bound by, and hereby assent to, all of the terms of the

Trust Agreement(s) creating said CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION AND/OR HEALTH AND WELFARE FUND, as amended, all of the rules and regulations heretofore adopted by the Trustees of said Trust Fund(s) pursuant to said Trust Agreement(s), and all of the actions of the Trustees in administering such Trust Fund(s) in accordance with the Trust Agreement(s) and rules adopted.

2. The Employer hereby accepts as Employer Trustees the present Employer Trustees appointed under said Trust Agreement(s) and all such past or succeeding Employer Trustees as shall have been or will be appointed in accordance with the terms of the Trust Agreement(s).

3. The Union hereby accepts as Union Trustees the present Union Trustees appointed under said Trust Agreement(s) and all such past or succeeding Union Trustees as shall have been or will be appointed in accordance with the terms of the Trust Agreement(s).

4(a). In accordance with the collective bargaining agreement, the affective date of participation in the Pension Fund is ——————.

4(b). In accordance with the collective bargaining agreement, the effective date of participation in the Health and Welfare Fund is ——————.

5(a). The Employer shall contribute to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND the following amounts per week/day for its bargaining unit Employees pursuant to the terms of the collective bargaining agreement, and only for such Employees:

Effective Date: ————Amount: $————
Effective Date: ————Amount: $————
Effective Date: ————Amount: $————

5(b). The Employer shall contribute to the CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND the following amounts per week for its bargaining unit Employees pursuant to the terms of the collective bargaining agreement, and only for such Employees:

Effective Date: ————Amount: $————
Effective Date: ————Amount: $————
Effective Date: ————Amount: $————

5(c). If the Employer signs and enters into a new collective bargaining agreement with the Union, or modifies such current collective bargaining agreement, the Employer must notify the Trust Fund(s) of such contractual change, and further agrees that no applicable Statute of Limitations shall begin to run until such notice of contract change has been received by the Fund(s).

6. The Employer and Union represent to the Trustees that payments will be made only on behalf of Employees in the collective bargaining unit, excluding, by way of example but not limitation, self-employed persons and supervisors, among others.

7. This Agreement shall continue in full force and effect until such time as the Employer notifies the Fund(s) by certified mail (with a copy to the Local Union) that the Employer is no longer under a legal duty to make contributions to the Fund(s). The Employer shall set forth in the required written notice to the Fund(s) the specific basis upon which the Employer is relying

in terminating its obligation to make contributions to the Fund(s). The Employer expressly agrees and hereby acknowledges by the signing of this Agreement that its obligation to make contributions to the Fund(s) shall continue until the above-mentioned written notice is received by the Fund(s) and the Trustees acknowledge the Employer's termination in writing.

8. Payments of Employer contributions are to be mailed to Central States Health and Welfare and Pension Funds, Post Office Box 71147, Chicago, Illinois 60694, or to such other depository as the Trustees may designate.

9. On or before the fifteenth (15th) day of the month after the prepared date of a bill, the Employer must report to the Fund(s) any changes in the status of Employees that are applicable to the period billed. Failure of an Employer to file a written report, on a form provided by the Fund(s) within said period constitutes automatic acceptance of and liability for the amounts due on the Employees listed. After said period has expired, an Employer will not be able to receive credit for any changes of employee status, regardless of actual terminations, leaves of absence, sick leave, layoffs or other changes. No Statute of Limitations made applicable as a result of any change in Employee status shall begin to run until said report of such change has been delivered to the Fund(s).

10. In the event of a delinquency on the part of the Employer, interest will be charged at a rate in accordance with the Trust Agreement(s) per annum on the outstanding balance. Any subsequent payments on delinquencies will be applied

in accordance with the policy established by the Trustees.

11. If an Employer signs a collective bargaining agreement through an Employer Association establishing participation in the Pension and/or Health and Welfare Fund, the respective Association's signature shall be binding on the respective Employers of the Association.

12. This Agreement and any interpretation thereof will be governed according to the law of the State of Illinois.

13. For purposes of this Agreement, the following definitions will govern:

(1) "Employer", as used herein, shall mean any Employer who is bound by a collective bargaining agreement with the Union and agrees to be bound by the Trust Agreement (Pension and/or Health and Welfare Fund), or any Employer not presently a party to such collective bargaining agreement who satisfies the requirements for participation as established by the Trustees and agrees to be bound by the Trust Agreement (Pension and/or Health and Welfare Fund).

(2) "Employee", as used herein, shall mean:

(a) A person (other than a person employed in a supervisory capacity) who has been on the payroll of an Employer for at least thirty (30) days who is employed under the terms and conditions of a collective bargaining agreement as entered into between an Employer and a Union, and on whose behalf contributions are required to be

made to the Pension and/or Health and Welfare Fund by the Employer; or

(b) All persons employed by the Union, as herein defined, upon being proposed by the Union and after acceptance by the Trustees as hereinafter defined; and as to such Union personnel the Union shall be considered an Employer, solely for the purpose of contributions, and shall, on behalf of such employees, make or be presently required to make contributions to the Pension and/or Health and Welfare Fund at the times and at the rate of payment equal to that required by any other Employer who participates in the Trust Fund for the same benefits; or

(c) All persons employed by CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, or CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND upon acceptance by the Trustees as hereinafter defined; and as to such personnel the Trustees shall be deemed an Employer, solely for the purpose of contributions, within the meaning of the Agreement(s) and Declaration(s) of Trust and shall, on behalf of such personnel, make or be presently required to make contributions to the Trust(s) at the times and at the rate of payment equal to that required by any other Employer who participates in the Trust Fund(s) for the same benefits.

(d) In all instances the common law test, or the applicable statutory definition of master-servant relationship shall control the Employee status.

(e) The continuation of Employee status once established shall be subject to such reasonable rules as the Trustees may adopt according to law.

(3) Hours worked, for purposes of this Agreement, shall mean time of employment for which an Employee is entitled to wages and includes, but is not limited to, show up time, overtime and vacation time. Hours worked shall also include payment of wages which is the result of any National Labor Relations Board action, grievance procedure, or proceeding which resulted in the payment of back wages to an Employee by the Employer. Additionally, the hours worked shall also include any period for which the Fund(s) is (are) obligated under the Employee Retirement Income Security Act of 1974 to award credited service to an Employee.

(4) Delinquent Employer, for purposes of this Agreement, shall mean an Employer whose contribution payment is not received on the fifteenth day of the month after the prepared date of a bill.

14. It is expressly agreed to by the Employer (its successors, administrators, executors and assigns) who is or may become a party to the collective bargaining agreement (including all renewals and extensions thereof) referred to in the second paragraph of this Participation Agreement that any and all disputes arising

between the Employer and the Fund(s) concerning the application and/or interpretation of the collective bargaining agreement's provision for contributions to said Trust Fund(s); this Participation Agreement; or the Fund(s) Trust Agreement as it relates to the Employer's obligations to submit contributions to the Fund(s) shall be submitted for resolution to the Trustees of the Fund(s) and need not be subject to the grievance-arbitration clause, or any other adjudicatory clause or clauses of the collective bargaining agreement. It is understood that in the event there remain any unresolved disputes between the parties to this Agreement after exhausting the procedure set forth in this paragraph, either party is free to seek appropriate judicial relief.

15. This Agreement is not binding upon the Fund(s) until accepted by the Trustees and confirmation of same is sent out over the signature of an authorized Fund(s) representative, normally the Executive Director.

IN WITNESS WHEREOF said Employer and Union have caused this instrument to be executed by their duly authorized representatives, the day and year first above written.

____

EMPLOYER

____

COMPLETE ADDRESS OF EMPLOYER

____

FEDERAL EMPLOYER NUMBER

BY

____

____

UNION

BY

____

If Employer is signed to Group/National Contract, give name of such Contract: ____________________

Is the Employer represented by a bargaining association, yes/no. If Yes, name:

MOTION FILED
AUG 26 1992

No. 91-610

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LOCAL 144 NURSING HOME PENSION FUND, *et al.*,
Petitioners,
v.
NICHOLAS DEMISAY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 37 of the Rules of this Court, the National Coordinating Committee for Multiemployer Plans (the "NCCMP") respectfully moves for leave to file the accompanying brief *amicus curiae* to urge the Court to reverse the decision below that all employer contributions to a multiemployer plan cannot be used to

provide benefits to all plan participants, without regard to who employed them. Petitioners have consented to the filing of this brief; Respondents have not.[1]

The NCCMP is a nonprofit, tax-exempt organization that was formed after the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA") to participate in the development of employee benefits legislation and government regulations promulgated to implement ERISA and other laws affecting multiemployer plans.[2] Currently, more than 190 multiemployer plans and related international unions, located in at least 37 states, are affiliated with the NCCMP.[3] These plans are representative of all of the nation's multiemployer plans, which cover more than nine million workers. If left unchallenged, the decision below will have an adverse impact on all multiemployer plans and, therefore, will be particuarly adverse to the interest of NCCMP affiliates, which represent the majority of participants in multiemployer plans.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to state the position of the trustees, participants, and beneficiaries of such plans. The NCCMP last participated as an *amicus curiae* before this Court in the case of *FMC Corp. v. Holliday*, 498 U.S. ——, 59 U.S.L.W. 4009 (U.S. 1990).

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[1] The letter of consent of Petitioners has been filed with the Clerk of the Court.

[2] ERISA was amended in 1980 by the Multiemployer Pension Plan Amendments Act of 1980, Pub. L. 96-364, 94 Stat. 1208 (1980). The NCCMP has been recognized as having had a "significant impact" on that statute by the Senate cosponsors of that legislation. *See* 126 Cong. Rec. S9835 (daily ed., July 24, 1980) and S10100 (daily ed., July 29, 1980).

[3] Petitioners are not affiliated with the NCCMP.

The decision below—if left unreversed—would force plan trustees to operate multiemployer plans as aggregates of separate single-employer plans, isolating the contributions of each employer to ensure that they be used only for that employer's employees. The NCCMP submits that the decision below will have far-reaching, negative consequences for the effective administration of multiemployer plans, inasmuch as these plans are established and maintained to use pooled trust assets for the benefit of all plan participants. We respectfully request this Court to reverse the decision below and to hold that employer contributions to a multiemployer welfare or pension plan can be used for the benefit needs of all plan participants.

The NCCMP will limit its discussion to the conflict between the decision below—that an employer's contributions cannot be used for the benefit of other employers' employees—and the express terms of governing federal law and its legislative history, as well as the interpretation of that law by the judiciary and the executive.

Based on the foregoing, the NCCMP respectfully moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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Dated: August 1992

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BRIEF *AMICUS CURIAE* OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS IN SUPPORT OF PETITIONERS

INTRODUCTION

The National Coordinating Committee for Multiemployer Plans (the "NCCMP") submits this brief *amicus curiae* to urge the Court to reverse the holding below, which contradicts the fundamental premise upon which multiemployer plans are established and administered: that all employers' contributions are available to provide benefits to any employer's employees.

INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIEMPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying Motion for Leave to File this Brief. The NCCMP submits that the failure to reverse the decision below would undercut the purpose and structure of multiemployer plans. If the proposition asserted by Appellants-Respondents and embraced by the court below—that an individual employer's contributions to a multiemployer plan may never be used for the benefit needs of another employer's employees—were accepted as true, the current multiemployer plan system would have to be completely restructured. Such a restructuring of multiemployer plans would conflict with the Congressional directive to encourage the establishment and maintenance of such plans to provide pension and welfare benefits.

The Congress, familiar with the way in which multiemployer plans operate, enacted ERISA with all of its intricacies, in order to ensure "the continued well-being and security of millions of employees and their dependents" directly affected by employee benefit plans. ERISA § 2(a), 29 U.S.C. § 1001(a). *See* 29 U.S.C. § 1001a (a)(3). Neither in ERISA nor in Section 302 of the Labor-Management Relations Act ("LMRA")[1] did Congress, expressly or otherwise, draw distinctions between multiemployer plan participants, according to their allegiance to a particular employer, or artificially divide multiemployer plan contributions according to employer-employee alliances. The corpus of each mutiemployer trust fund is established for all participants, without regard to whether particular employers or employees choose to discontinue their participation in the fund. As a national representative of multiemployer plan trustees, participants, and beneficiaries, the NCCMP submits that the

[1] 29 U.S.C. § 186.

decision below draws such employer-to-employee distinctions and, thereby, threatens the viability of all multiemployer plans.

SUMMARY OF ARGUMENT

The NCCMP urges this Court to reverse the decision below, in order to prevent the eradication of the principles upon which multiemployer plans are founded and funded. The decision below is based on the flawed presumption that the LMRA requires trustees to isolate each employer's contributions to ensure that no employer's contributions will be used to benefit participants who work for other employers. Yet, multiemployer plans "pool" their administrative and financial resources—including contributions—in order to provide benefits to all eligible participants. As the name implies, a multiemployer plan relies on the contributions of a multitude of employers to provide particular levels of benefits to all eligible participants. Were the contributions of each employer isolated, the result would be an aggregate of separate single-employer plans, *see* Treas. Reg. § 1.414(1), that would undercut the entire structure of multiemployer plans.

Multiemployer plans are simply not designed to effectuate the type of employer-to-employee match that the decision below advocates. In recognition of the design of these plans, LMRA Section 302(c)(5) provides that contributions are to be used for the sole and exclusive purpose of benefiting a contributing employer's employees "jointly with the employees of other employers making similar payments," 29 U.S.C. § 186(c)(5). The court below gave no consideration to this express statutory directive.

When Congress did consider and enact a comprehensive, highly detailed amendment to ERISA, *i.e.*, the Multiemployer Pension Plan Amendments Act ("MPPAA"), Congress carefully delineated the specific instances when

employers are required to pay into a multiemployer fund, and when they are entitled to receive assets out of a fund—none of which include the situation presented in the instant case.

Moreover, the legislative histories of the LMRA, ERISA, and MPPAA do not provide any support for the proposition that an employer's contributions to a multiemployer fund can only be used for its own employees. In fact, Congress time and again considered, debated, and ultimately rejected the type of technical provisions that would accomplish the fund-to-fund transfer that the decision below demands. Congress clearly did not enact the LMRA, ERISA, and MPPAA, in order to mandate, *sub silentio*, that multiemployer plans should operate as aggregates of single-employer plans.

ARGUMENT

I. SECTION 302(c)(5) OF THE LABOR-MANAGEMENT RELATIONS ACT

The ruling below is based on the proposition that LMRA Section 302(c)(5) makes it unlawful for funds contributed by one employer to be used for the benefit of persons other than its own employees. This proposition is contrary to the plain language of Section 302(c)(5) and the legislative history of that statute. This proposition has also been rejected by the United States Court of Appeals for the Seventh Circuit in *Stinson v. Ironworkers District Council of Southern Ohio & Vicinity*, 869 F.2d 1014, 1021 (7th Cir. 1989).

In *Walsh v. Schlecht*, 429 U.S. 401 (1977), this Court upheld a collective bargaining agreement provision that obligated a general contractor to contribute to multiemployer pension and welfare funds, where the contributions were based on the hours of work performed by a subcontractor's employees, none of whom were eligible to receive benefits. In holding that the provision did not violate LMRA Section 302, this Court expressly acknowl-

edged that the general contractor's contributions satisfied the Taft-Hartley exclusive benefit rule, where the general contractor's contributions were being used "solely for the benefit of the employees of the petitioner [general contractor] and other signatory employers." *Schlecht*, 429 U.S. at 409.

This Court's recognition that one employer's contributions to a multiemployer plan are available to provide benefits to the employees of all employers flows from the plain language of LMRA Section 302(c)(5), which states that employer contributions must be "for the sole and exclusive benefit of the employees of such employer . . . or of such employees . . . jointly with the employees of other employers making similar payments. . . ." The Conference Report, accompanying the LMRA, mirrors the sole and exclusive benefit language of Section 302(c)(5) that employer contributions are to be used for the benefit of employees of the employer jointly with the employees of other employers. H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 67 (1947).[2]

The exclusive benefit rule in LMRA Section 302(c)(5) does not distinguish between contributions to provide pension benefits and contributions to provide welfare benefits; the same language is used in the same sentence in the same statutory provision for both kinds of plans. And, the federal judiciary has recognized that one employer's contributions to a multiemployer plan can be

[2] The United States General Accounting Office recently issued a report on welfare benefits entitled "Employee Benefits: Extent of Multiemployer Plan Retiree Health Coverage" (GAO/HRD-90-132) (July 1990), with one of its primary focuses being the construction industry, as "[o]ver half of all multiemployer health plans and 62 percent of plans with retiree coverage are in the construction industry. . . . [W]orkers in the construction industry are considered to have an employment relationship with the industry as a whole rather than with any one company. The industry is best able to meet workers' and retirees' health needs collectively, through multiemployer plans." Report at 6-7.

used to fund the pension benefits of another employer's employees. As the First Circuit noted in *Berkshire Hathaway v. Textile Workers Pension Fund*, 874 F.2d 53, 55 n.2 (1st Cir. 1989), "multiemployer pension plans are structured as 'pooled' funds, such that some employers, in effect, 'subsidize' the employees of other employers." It defies logic and Article III of the Constitution for the court below to have rewritten the plain language of LMRA Section 302(c)(5).

The legislative history of the Taft-Hartley Act is replete with Congressional concerns about John L. Lewis using employer fringe benefit contributions to create a war chest for the United Mine Workers. *See, e.g.*, S. Rep. No. 105, 80th Cong., 1st Sess. 53 (1947); 93 Cong. Rec. 4875-76 (daily ed. May 8, 1947). To address these concerns, the Congress enacted, *inter alia*, LMRA Section 302(c)(5). Clearly, the UMWA's Retirement and Welfare Plans have been required to comply with Section 302(c)(5) for over forty years. *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

On March 12, 1990, the Advisory Commission on the United Mine Workers of America ("UMWA") Retiree Health Benefits was established to make recommendations to the Secretary of Labor on health care issues relating to these selfsame UMWA Welfare Plans. On November 5, 1990, the Commission issued its recommendation (the "Coal Commission Report") to the Secretary of Labor. Along with the Report, the Commission's Chairman (William J. Usery, Jr.) sent the Secretary an Executive Summary of the Report, which states in pertinent part:

> In the last 10 years, the health care costs paid by the UMWA Health and Retirement Funds have doubled. . . . Much of the cost is attributable to "orphaned" retirees whose companies have gone out of business or ceased paying for health care benefits. More than half of the Funds' population is composed of orphan retirees. How to continue to provide health

> benefits to "orphans" is the essence of the problem. Signatory coal operators who are still in the coal business are willing to pay the fair cost of their retirees, but are increasingly unwilling to shoulder the burden of paying for orphans, which they view as an industry-wide problem.

Summary at iv. *See* Report at 81-88.

In other words, the Coal Commission reported to the Secretary of Labor that employers are contributing to provide benefits to other employer's employees. The decision below would equate this use of plan assets with a violation of LMRA Section 302, *i.e.*, a criminal act. Yet, the Coal Commission was not reporting to the Secretary of Labor about violations of LMRA Section 302. The Coal Commission was reporting about an acknowledged and countenanced practice by multiemployer welfare plans to use employers' contributions collectively to provide benefits to employees without the restrictions that the court below engrafted on LMRA Section 302.

II. EMPLOYEE RETIREMENT INCOME SECURITY ACT

ERISA is a comprehensive statute that dictates the duties of trustees in receiving, managing, investing, distributing, and transferring plan assets solely in the interest of participants and their beneficiaries. One of the primary purposes of enacting ERISA was to provide strict fiduciary standards for the governance of pension and welfare benefit plans where only general guidelines existed under the LMRA. Section 302 of the Labor-Management Relations Act "provides the fundamental guidelines for the establishment and operation of pension funds administered jointly by an employer and a union. The Act is not intended to establish nor does it provide standards for . . . fiduciary conduct." S. Rep. No. 127, 93d Cong., 1st Sess. 4 (1973).[3]

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[3] "Although the [LMRA] established certain structural and procedural requirements for employee benefit plans in 1947, ERISA

The court below concluded that an employer's contributions to a multiemployer plan cannot be used for the benefit needs of other employers' employees. It is axiomatic, however, that multiemployer plans consist of the "pooled" assets of numerous employers. *See, e.g., Central States, SE & SW Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 562 (1985) (stating, as part of the factual background of the case, that each employer must make weekly contributions to the fund on behalf of each employee performing covered work, and that each plan consists of "thousands of participating employers"); *Berkshire Hathaway, Inc. v. Textile Workers Pension Fund*, 874 F.2d at 54 n.4.[4] Similarly, the Internal Revenue Code provides that, with respect to multiemployer plans, "in determining whether the plan of an employer is for the exclusive benefit of his employees and their beneficiaries, all plan participants shall be considered to be his employees." I.R.C. § 413(b)(3).

Additionally, it cannot be disputed that some participants in multiemployer plans will receive benefits, while others will not. *See, e.g., Ponce v. Construction Laborers Pension Trust Fund*, 582 F. Supp. 1310, 1314 (C.D. Cal. 1984), *aff'd*, 774 F.2d 1401 (9th Cir. 1985), *cert. denied*, 479 U.S. 890 (1986). Yet, the denial of benefits to even

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created numerous higher standards for the administration of such plans." *Cutaiar v. Marshall*, 590 F.2d 523, 530 (3d Cir. 1979) (emphasis supplied). *See also NLRB v. Amax Coal Co.*, 453 U.S. 322, 332 (1981) (stating "[w]hatever may have remained implicit in Congress' view of the employee benefit trustee under the [LMRA] became explicit when Congress passed [ERISA]. ERISA essentially codified the strict fiduciary standards that a § 302(c)(5) trustee must meet").

[4] *See also Local Union No. 5 v. Mahoning & Trumbull County Building Trades Welfare Fund*, 541 F.2d 636, 639 (6th Cir. 1976) (explaining that the use of a pooled fund where one employer's contributions benefit another employer's employees is authorized by Section 302(c)(5) of LMRA).

a single participant in a multiemployer plan has the effect of increasing the fund—*i.e.*, the pooled contributions of all employers—available to provide to eligible employees of all employers. *Wilson v. Board of Trustees of the Pension Trust Fund for Operating Eng'rs*, 564 F.2d 1299, 1302 (9th Cir. 1977). In these cases, there was no attempt by the courts, the trustees, the employers, or the participants to accomplish what the court below held is mandated by law—preventing one employer's contributions to a multiemployer plan from ultimately benefiting the employees of other contributing employers. This result, compelled by the decision below, is completely contrary to the structure of multiemployer plans.

The *Berkshire* court accurately described multiemployer plans as "pooled funds," a description borne out by the fact that the contributions of some employers routinely pay for the otherwise unfunded benefits of employees whose employers have withdrawn from a multiemployer pension plan. *Central States*, 472 U.S. at 580, 581 n.22; *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1566 (D.C. Cir.), *cert. denied*, 469 U.S. 834 (1984); *Harm v. Bay Area Pipe Trades Pension Plan Trust Fund*, 701 F.2d 1301, 1305 (9th Cir. 1983).

Thus, the premise underlying the holding below cannot possibly coexist with the LMRA, ERISA, or MPPAA, much less compel the fund-to-fund transfer directed by the court below. For example, if an employer's contributions to a multiemployer plan could never benefit the employees of any other employer, then the employee-participants of a delinquent or insolvent employer might not receive welfare benefits, because the contributions of current employers could not be used to pay the benefits of anyone other than their own employees. Yet, in the typical situation, each employer's contributions are available to provide benefits to any employer's eligible employees. *See Board of Trustees of the Watsonville Frozen Food Welfare Trust Fund v. California Cooperative Creamery*,

877 F.2d 1415, 1420 (9th Cir. 1989).[5] Moreover, ERISA requires a pension plan[6] to award service credit without regard to whether an employer has made its required contributions. *Central States*, 472 U.S. at 567 n.7, 579 n.20.

Similarly, in a case recently decided by the United States Court of Appeals for the Ninth Circuit, *Phillips v. Alaska Hotel & Restaurant Employees Pension Fund*, 944 F.2d 509 (9th Cir. 1991), the court rejected the approach of the Second Circuit in the instant case, *id.*, 944 F.2d at 517. Instead, the *Phillips* court viewed the participants as a pool, without regard to the particular employer-employee relationships, *id.* The *Phillips* court accepted the fact that, although contributions were made on behalf of all persons working in covered employment, only a fraction of those participants would ever be eligible for benefits. *Phillips*, 944 F.2d at 515-18. It is axiomatic that any one employer's contributions to a multiemployer plan will be pooled for the theoretical use of all eligible participants, only some of whom will actually receive benefits, because that is the nature and structure of multiemployer plans.[7]

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[5] In *California Cooperative Creamery*, 877 F.2d at 1420, the court faced the unusual situation in which a welfare plan had established a form of withdrawal liability to prevent withdrawing employers from leaving only the remaining contributing employers to fund the benefits of the withdrawn employer's employees.

[6] This Court has been careful to state that, "[a]lthough most of ERISA's legislative history focused on pension plans, Congress also studied the operation of other employee benefit plans and developed a similar regulatory framework respecting these other plans. For example, ERISA's rules concerning reporting, disclosure, and fiduciary responsibility apply to all employee benefit plans." *Central States*, 472 U.S. at 569 n.9. Thus, there is no basis in ERISA or its legislative history for distinguishing between welfare and pension plans where the issue is one that concerns the basic operation of multiemployer plans, such as the issue in this case.

[7] This Court has emphasized, in a number of decisions, the collective responsibilities of the unions and employers that sponsor multi-

III. MULTIEMPLOYER PENSION PLAN AMENDMENTS ACT

The decision below also undermines the Multiemployer Pension Plan Amendments Act ("MPPAA") which is a comprehensive, detailed amendment to ERISA. MPPAA compels an employer that withdraws from a multiemployer pension plan to pay a share of the unfunded vested benefits of all eligible employees who participate in the plan. Particularly revealing for purposes of the instant case is the theory under which Congress chose to allocate to each withdrawing employer a portion of the liability for all employee-participants' benefits. When an employer withdraws from a multiemployer plan in a complete withdrawal,[8] the employer is liable to the plan for an "allocable amount of unfunded vested benefits," ERISA § 4201. Even if the unfunded vested benefits for a plan are the result of the delinquent contributions of fifty employers other than the withdrawing employer, the withdrawing

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employer plans. In *Central States*, the Court decided the issue of whether an employer patricipating in a multiemployer benefit plan governed by ERISA must allow the plan to conduct an audit involving the records of all employees, including records of employees who the employer denied were participants in the plan. In the course of its analysis, the Court reaffirmed its decision in *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984), emphasizing the independent nature of multiemployer benefit plans, and the trustees' duty to the needs of the plan as a whole. The Court stated: "[A]s we recognized in *Schneider*, a union's arrangements with a particular employer might compromise the broader interests of the plan as a whole: 'These are multiemployer trust funds. Each of the participating unions and employers has an interest in the prompt collection of the proper contribution from each employer. Any diminution of the fund caused by the arbitration requirements of a particular employer's collective bargaining agreement would have an adverse effect on the other participants.'" *Central States*, 472 U.S. at 576, *citing Schneider*, 466 U.S. at 373.

[8] With certain exceptions not relevant here, a complete withdrawal occurs under ERISA "when an employer (1) permanently ceases to have an obligation to contribute under the plan, or (2) permanently ceases all covered operations under the plan." ERISA § 4203(a).

employer is still liable for a proportionate share of the unfunded vested benefits for that plan.[9] It does not necessarily matter whether the withdrawing employer has, in fact, made contributions to the plan in an amount sufficient to fund the vested benefits for the individual participants that it employs; it matters only that there are unfunded vested benefits for the plan as a whole. *See J. Caflisch, Employer Withdrawal Liability Under The Multiemployer Pension Plan Amendments Act of 1980*, 9 Pens. Rep. (BNA) 182, 188-89 (1982) (hereinafter "Caflisch"). Thus, to assert that trustees must transfer plan assets from one fund to another so that the specific contributions made on behalf of specific employees will inure to their benefit only, is to disregard the theory underlying withdrawal liability.

There is additional evidence in MPPAA that Congress did not intend each employer's contributions to be used only for the benefit of its own employees. In MPPAA, Congress established four methods of calculating withdrawal liability, none of which precisely determine the allocable unfunded vested benefits for an individual employer in relation solely to its own employees. Section 4211 of ERISA provides that the unfunded vested bene-

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[9] During the deliberations over MPPAA, the Senate Committee on Labor and Human Resources reported:

> [Delinquent contributions] detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.

Staff of Senate Committee on Labor and Human Resources, S. 1076: The Multiemployer Pension Plan Amendments Act of 1980, 96th Cong., 2d Sess. at 233-34 (unnumbered Committee print, April 1980).

fits allocable to an employer that withdraws from a plan are to be determined under one of four methods, namely the "presumptive," "modified presumptive," "rolling five," or "direct attribution" methods. ERISA §§ 4211(b), 4211(c); 29 C.F.R. § 2642.1 (1988). Each of the methods for calculating withdrawal liability under ERISA Section 4211 is different, and "the method adopted may have a tremendous impact on the potential withdrawal liability of employers who contribute to the plan." Caflisch at 189.

Congress did not seek to make each withdrawing employer liable solely for the unfunded vested benefits of its own employees. Rather, Congress chose to make each employer liable for a share of the unfunded vested benefits of the plan as a whole. Thus, each withdrawing employer pays for the unfunded vested benefits of employee-participants which are not necessarily its own. Likewise, when a withdrawing employer does not contribute enough to satisfy its share of the unfunded vested benefits of the plan, or does not contribute a share commensurate with the vested benefits earned by its employee-participants, the employers that remain in the plan cover the cost of those benefits, either through increased contributions or through increased withdrawal liability. *See Berkshire*, 874 F.2d at 55 n.2; *Stewart*, 730 F.2d at 1554 n.4.

The decision below is also inconsistent with the fact that, of the four statutory methods of calculation, only one of the four methods—the direct attribution method—"attempts to relate a withdrawing employer's liability to the unfunded vested benefits that are directly related to the employer." Caflisch at 190. Moreover, the "direct attribution" method of calculating an employer's withdrawal liability has been called "unworkable" for most multiemployer plans:

> In practice . . . this approach probably will prove to be unworkable for most plans. In order to be perceived as equitable, direct attribution probably would

> be extremely complex and would require extensive data that most plans do not have. Even if adequate data is available, it may be difficult to obtain agreement on the proper method to use in attributing unfunded vested benefits to employee's [sic] service with particular employers. Finally, it may be argued that since direct attribution attempts to determine liability as if a multiemployer plan were an aggregate of single employer plans, direct attribution is fundamentally inconsistent with the basic nature of multiemployer plans.

Caflisch at 190. What the decision below demands, in effect, is that all multiemployer plans be treated as aggregates of single-employer plans. But this, Congress has chosen not to do.

If LMRA Section 302(c) were really to require that no one employer's payments into a multiemployer plan could be used for the benefit of other employers' employees, then the LMRA would operate so as to make illegal the imposition of withdrawal liability under ERISA. Yet, ERISA and MPPAA were enacted many years after—not before—the LMRA. Moreover, the Congress expressly considered the LMRA during the deliberations that led to the drafting and enactment of ERISA. *E.g.*, H. Rep. No. 533, 93d Cong., 2d Sess. (1974), *reprinted in* II *Legislative History of the Employee Retirement Income Security Act of 1974* 2348, 2349-50 (1976) (hereinafter "*Legis. Hist.*"). And, Congress did not conclude that the statutes were inconsistent.

IV. PORTABILITY

Finally, the legislative history of ERISA reveals Congressional deliberations with respect to the enactment of a provision that would provide participants with the ability, in some manner, to carry their benefits with them when they left one employer for another.

In the Report of the Committee on Finance for the Senate that accompanied S. 1179, which was a precursor

to ERISA, entitled the "Comprehensive Private Pension Security Act of 1973," the Committee emphasized the policy reasons for trying to find a way to establish portable pension rights: "The mobility of labor in the United States has been steadily increasing. . . . On retirement, these employees will have to deal separately with each of their employers . . . and since each employer may have a different type of plan, working out retirement programs may be difficult for these employees." S. Rep. No. 383, 93d Cong., 1st Sess. (1973), *reprinted in* I *Legis. Hist.* 1063, 1140. For these reasons, Congress analyzed the feasibility and desirability of mandating portable benefits for individual employees, and developed a number of proposals for implementing portable pension rights.

The legislative history of ERISA makes it clear that Congress fully considered the problems resulting from the development of portable rights. For example, Congress discussed a central portability fund, but only in voluntary terms, because of the relief that such a central fund was not "workable" on a mandatory basis. S. Rep. No. 383, 93d Cong., 1st Sess. at 31 (1973), *reprinted in* I *Legis. Hist.* at 1098. The Finance Committee Report on S. 1179 explained one of the difficulties of making the central fund mandatory, stating that "it often would be difficult to place a specific value on the vested rights of an employee in a fixed benefit pension plan in view of the fact that the formulas under which benefits are computed, as well as the actuarial assumptions used, vary widely." S. Rep. No. 383, 93d Cong., 1st Sess. at 31 (1973), *reprinted in* I *Legis. Hist.* at 1099.

Congress had an additional concern: the effect on the funding of a pension plan when employees sought to transfer their individual benefits. The Finance Committee determined that "the compulsory transfer of funds representing an employee's vested rights from an employer's pension plan to the central portability fund would raise further difficulties where the pension plan is not

fully funded, since the transfer of funds under such circumstances might be considered detrimental to the remaining covered employees in the pension plan." *Id.*

During the floor debates leading to the enactment of ERISA, Senator Dole stated: "I do not know whether portability adds much from the employee's point of view, and its administration certainly has many negative aspects for employers and in the creation of another bureaucracy to oversee it. In any event it should be noted that portability [at this stage] is voluntary and there is no intention of making it mandatory." Sept. 18, 1973, Floor Debate on S.4, *reprinted in* II *Legis. Hist.* at 1876. Similar views were presented in the House of Representatives. For example, Representative Esch encouraged the establishment of portable rights, but stated that "it should be recognized that any attempt to make vested funds portable from one plan to another is impracticable and administratively unfeasible." Individual Views filed with H. Rep. No. 533, 93d Cong., 1st Sess. 1973, *reprinted in* II *Legis. Hist.* at 2392.

It is significant that Congress ultimately rejected the notion of portable pension rights. The fact that Congress considered what rights an employee had with respect to accrued vested benefits, when the employee left one employer for another, demonstrates that Congress was fully cognizant of the situations in which employees would not gain the benefit from contributions made on their behalf. Congress considered the notion of matching employees to their accrued benefits, and Congress rejected it; the decision below requires it.

CONCLUSION

Based on the foregoing, we respectfully urge the Court to reverse the decision of the United States Court of Appeals for the Second Circuit in this case.

Respectfully submitted,

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